S182598

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In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
BARRY ALLEN TURNAGE,
Defendant and Appellant.

Case No. S_____

SUPREME COURT
FILED
MAY 12 2010
Frederick K. Ohlrich Clerk
Deputy

CRC 8.25(b)

Third Appellate District, Case No. C059887
Yolo County Superior Court, Case No. 065019
The Honorable Thomas Edward Warriner, Judge

PETITION FOR REVIEW

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The People of the State of California hereby petition this Court to grant review to settle important questions of law concerning the legislative distinction between false bombs and false weapons of mass destruction (WMDs) and judicial reformation of the false bomb statute.

ISSUES PRESENTED

1. Where there is a conceivable basis for distinguishing between the likelihood that fear will actually result from placement of an object intended as a false bomb, versus an object intended as a false WMD, did the Legislature violate the guarantee of equal protection of the laws by conditioning felony punishment on affirmative proof of resulting fear as to the false WMD, but not for the false bomb?

2. Even if equal protection of the laws required identical proofs in each context to make felony punishment available, did the Court of Appeal adhere to legislative intent by precluding availability of felony punishment for appellant, rather than permitting the People to cure any inequality by proving that sustained fear resulted from appellant's placement of a false bomb?

SUMMARY OF ARGUMENT

In a partially published opinion, the Court of Appeal found that the Legislature denied equal protection to persons who place false bombs, compared to persons who place false WMDs, in the method by which the Legislature made felony punishment available. That finding – that a legislative scheme had to be judicially reformed in order to be made constitutional – is an issue of great importance, requiring statewide uniformity. The finding was wrong under binding precedent and warrants review.

The Court of Appeal remedied the alleged defect by precluding felony punishment against appellant, barring the otherwise proper application of

the Three Strikes Law. The judicial act of exempting appellant's offense, and narrowing the reach of the Three Strikes Law by judicial reformation, presents an issue of great importance, requiring statewide uniformity. That judicial act was contrary to the evident intent of the Legislature to ensure availability of felony punishment – with the accompanying impact of the Three Strikes Law – at the very least in each instance where placement of false bombs or false WMDs resulted in sustained fear. The Court of Appeal's manner of judicial reformation was therefore wrong under binding precedent, and review is warranted.

STATEMENT OF THE CASE

In 2006, appellant placed a false bomb near a government building (a dispatch center). (IRT 33-54, 92, 95-96, 108, 110.) The false bomb was a small box with "C-4" written on the front and an American flag sticking out of the top. (IRT 40, 52.)

In 2008, the Yolo County District Attorney charged appellant with placing a false bomb (Pen. Code, § 148.1, subd. (d)) and alleged that appellant had two prior "strike" convictions. (ICT 104-105.)[1] The jury found appellant guilty of placing the false bomb and found true the prior-conviction allegations. (ICT 206, 241, 242.) Appellant was sentenced to a total prison term of 30 years to life. (IICT 330-331.)

Appellant appealed. He argued, and in an a partially published opinion the Court of Appeal agreed, that his felony punishment under the false bomb statute violated equal protection because the statute imposed a felony for placing a false bomb without requiring affirmative proof that sustained fear resulted, but felony treatment for placing false WMDs does require affirmative proof that sustained fear resulted.

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[1] All further undesignated statutory references are to the Penal Code. Section 148.1, subdivision (d), will be cited as section 148.1(d).

To remedy the constitutional violation that it had found in the Legislature's method of distinguishing the necessary proofs, the Court of Appeal did not remand for the People to prove sustained fear as a condition of retaining the felony punishment. The Court failed to do so even though the Legislature had already authorized such punishment for conviction of the false bomb offense for which appellant had already been convicted. Instead, despite a rehearing petition from the People on that precise point, the Court of Appeal left in place its ruling outright barring felony punishment for appellant, and reduced appellant's offense to a misdemeanor. (Attachment A [Court of Appeal opinion]; see Court of Appeal order denying rehearing].)

REASONS FOR GRANTING THE PETITION

I. BECAUSE IT IS AT LEAST CONCEIVABLE THAT APPELLANT'S PLACEMENT OF A FALSE BOMB WAS MORE LIKELY TO RESULT IN SUSTAINED FEAR THAN WAS PLACEMENT OF A FALSE WMD, IT DOES NOT VIOLATE EQUAL PROTECTION THAT NO AFFIRMATIVE PROOF OF SUSTAINED FEAR IS REQUIRED FOR FELONY PUNISHMENT OF APPELLANT'S OFFENSE, EVEN THOUGH AFFIRMATIVE PROOF OF SUSTAINED FEAR IS REQUIRED FOR THE NEWER OFFENSE OF PLACING A FALSE WMD

A person who places a false bomb, with intent to cause fear, is guilty of a crime punishable alternatively as a felony or misdemeanor, without the need for the prosecution to affirmatively prove that sustained fear resulted. (§ 148.1(d).) In contrast, a person who places a false WMD, with the intent to cause fear, is guilty of a crime which is punishable as a misdemeanor in the absence of proof of sustained fear, and punishable as a felony only upon affirmative proof of sustained fear. (§ 11418.1) Appellant argued, and the Court of Appeal agreed, that no rational basis exists to distinguish between placing a false bomb and placing a false WMD. Accordingly, the Court of

Appeal concluded that the statutes' differing proof requirements for felony punishment violated equal protection.

However, the Court of Appeal was required to affirm the Legislature's method of distinguishing between proofs necessary for the different offenses unless and until such method's unconstitutionality was proved "clearly, positively, and unmistakably" - with all "presumptions and intendments" in favor of rejecting appellant's challenge. (*People v. Falsetta* (1999) 21 Cal.4th 903, 912-913.) And in light of the great deference to be paid to the Legislature in making such distinctions, neither appellant's showing nor the reasoning of the Court of Appeal met that heavy burden. To the contrary, it was not clearly, positively, and unmistakably proven that there is no conceivable basis to find that at least sometimes the placement of a false bomb is worse than the placement of a false WMD. Rather, it is at least conceivable that sometimes a false bomb is more readily perceived as a dangerous object, while a false WMD more likely may not be perceived as intended to be a dangerous object at all.

A. Legal Standards

This Court has admonished: "Generally, when we interpret a provision of the California Constitution that is similar to a provision of the federal Constitution, we will not depart from the United States Supreme Court's construction of the similar federal provision unless we are given cogent reasons to do so." (*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 168.)

In turn, the United States Supreme Court has described the rational basis standard for review of equal protection claims in strong terms which bar judges from engaging in examination of acts within the province of the legislative branch of government:

> We many times have said, and but weeks ago repeated, that rational-basis review in equal protection analysis "is not a

> license for courts to judge the wisdom, *fairness*, or *logic* of legislative choices." [Citations.] [Citations.] Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." [Citation.] For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. [Citations.] Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. [Citations.] Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." [Citations.] Instead, a classification "must be upheld against equal protection challenge if there is any *reasonably conceivable* state of facts that could provide a rational basis for the classification." [Citations.]
>
> A State, moreover, has no obligation to produce *evidence* to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational *speculation unsupported by evidence or empirical data*." [Citations.] A statute is presumed constitutional, [citation], and "[t]he burden is on the one attacking the legislative arrangement to negative *every conceivable basis* which *might* support it," [citation], whether or not the basis has a foundation in the record. Finally, courts are *compelled* under rational-basis review to accept a legislature's generalizations even when there is an *imperfect* fit between means and ends. A classification does not fail rational-basis review because it " 'is not made with mathematical nicety or because in practice it results in some *inequality*.' " [Citation.] "The problems of government are practical ones and may justify, if they do not require, rough accommodations – *illogical*, it may be, and unscientific." [Citations.] . . .

(*Heller v. Doe* (1993) 509 U.S. 312, 319-321, emphasis added.)

While the high court has observed that there must be "*some* footing in the realities of the subject addressed by the legislation" (*Heller v. Doe*, *supra*, 509 U.S. at p. 321, emphasis added), that merely means a court may intervene when the "statutory classification" is one that " ' "rests on

grounds *wholly* irrelevant to the achievement of the State's objective" ' " (*id.* at p. 324, emphasis added). And it is not irrational to impose disparate requirements of proof – even assuming potentially similar factual results – if it is conceivable that there is a difference in how readily the operative facts can be ascertained. (*Ibid.*)

In similar fashion, this Court in *People v. Wilkinson* (2004) 33 Cal.4th 821, rejected the defendant's argument that his equal protection rights were violated by an irrational statutory scheme which punished the "lesser" offense of battery on a custodial officer without injury more severely than the "greater" offense of battery on a custodial officer with injury. This Court found the defendant's premise – that battery without injury is always a less serious offense than battery with injury – to be questionable. (*People v. Wilkinson*, *supra*, at p. 839.) Indeed, in refutation of the defendant's premise, this Court provided an example of "a hypothetical defendant who, in the course of grabbing the arm of a correctional officer, inflicts a puncture wound with her fingernail that requires medical attention" compared to a "defendant who repeatedly hits and kicks the correctional officer, intending to cause serious injury but does not do so through no lack of effort." (*Ibid.*, internal quotation marks omitted.) Thus, the statutory scheme was neither irrational nor offensive to equal protection principles because the Legislature could have believed that the "ostensible 'lesser' offense . . . *sometimes* may constitute a more serious offense and merit greater punishment than the 'greater' offense." (*Ibid.*, emphasis added.)

B. Application

It is both conceivable and logical that a principal harm resulting from placement of a *false* bomb or WMD is the fear that results once another person mistakenly *perceives* the item to be a bomb or WMD. And it is conceivable that there may be differences between the likelihood that a

false bomb will trigger such perception and the likelihood that a false WMD will trigger such perception.

It would not be irrational to speculate that, given the long-standing public exposure to bombs in their many forms, the typical defendant attempting to make an item look like a bomb will have a considerable likelihood of success. Thus, it would not be irrational to speculate that the typical innocent person encountering the item will be likely to perceive the item as a bomb. Conceivably, it is easy enough to seal a box with a ticking clock inside, or fashion a device with tell-tale wires exposed (things commonly shown on television or in movies), to create an object likely to be perceived as a bomb. Hence, it is rational to speculate that in the great majority of cases a defendant who sets out to create fear, by means of a placing a false bomb, will succeed in creating sustained fear.

In contrast, public exposure to WMDs is far less long-standing, and it is at least reasonably *conceivable* that for many persons – both defendants and innocent members of the public, even if to different degrees – the appearance of WMDs is not so readily known. Items intended to falsely represent WMDs include many different objects (see § 11417) that an average person might readily dismiss, unaware that the (false) items were even intended to appear dangerous. For example, a false WMD could simply be an envelope containing trace amounts of talcum powder – that an average person, upon receipt, might readily dismiss as not intended to represent a dangerous item. Alternatively, a bottle or vial with liquid inside, labeled (or not) with the name of an obscure dangerous chemical agent, may be placed and thus encountered in many areas where (irrespective of the defendant's intent) the item simply may be dismissed, possibly as only cleaning material. Thus, it is *conceivable* that a defendant who sets out to create fear, by means of a placing a false WMD, will be less likely to create sustained fear. And because it is conceivably less certain

that a false WMD will create fear, a legitimate governmental objective would be to decline, at the present time, to extend felony treatment to placement of false WMDs in the absence of some assurance that fear actually resulted from this new form of crime.[2]

It does not suffice, to prove the unconstitutionality of a legislative scheme, that a court might suspect it is unfair, imperfect, illogical, or at times inequitable. (*Heller v. Doe*, *supra*, 509 U.S. at pp. 319, 321.) Therefore, it is not unconstitutional for the false bomb and false WMD statutes to (1) operate in light of that conceivable difference in the likelihood of resulting fear, by (2) requiring actual proof of fear in one case, but not the other, to obtain felony treatment. In any event, there is considerable logic in the different requirements of proof.

As stated, a conceivable difference is that placement of a false WMD is somewhat (or at least sometimes) less likely than a false bomb to succeed in creating fear. The statutory scheme requires affirmative proof of success in the former case to obtain felony punishment, and does not require affirmative proof of success in the latter to obtain felony punishment. It cannot be said that imposing the requirement of proof only in the more uncertain false WMD context is "wholly irrelevant" to a legitimate governmental objective of limiting the availability of felony punishment absent some reasonable assurance that harm has actually resulted from the newer form of crime.

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[2] " 'The Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached, but is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident.' [Citation.] '[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.' [Citation.]" (*People v. Silva* (1994) 27 Cal.App.4th 1160, 1170.)

The Court of Appeal overlooked this conceivable basis for distinction when it did not "divine any plausible reason" for felony punishment for placing a false bomb without affirmative proof that sustained fear resulted.[3] (Attachment A at p. 12.) The Court of Appeal focused on a belief that WMDs and bombs are legally indistinguishable. (*Ibid.*) But it is unnecessary to explore the correctness of that belief regarding *real* WMDs and bombs, whose harm is inflicted whether or not the victims were aware of their presence and nature.

Here, the Legislature's method of distinction focuses on harm caused by *false* WMDs and bombs. It is at least conceivable that a substantial quantum of that harm is resulting *fear* – and fear results only when a false device is *recognized* as the dangerous object it is intended to represent. If the device is not recognized for what it is intended to represent, then it will not instill fear. It is thus at least conceivable that "sometimes" the false WMD is distinctly less harmful (i.e., less likely to induce fear because it is less likely to be perceived as a dangerous object) than a more recognizable false bomb. It follows, under *Heller v. Doe*, *supra*, and *People v. Wilkinson*, *supra*, that it does not deny equal protection that felony punishment for placing a false WMD requires actual proof of fear, but felony punishment for placing a false bomb does not.[4]

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[3] Although the People did not develop this point until the rehearing brief, it was the affirmative burden of the challenging party "to negative every conceivable basis" which "might" make the statutory classification rational (*Heller v. Doe*, *supra*, 509 U.S. at p. 320), and the effect of the Court of Appeal's erroneous ruling would not be limited to the parties to this litigation.

[4] Finally, this Court should not be overly concerned with what the Legislature actually contemplated in creating this legislative distinction. (See Attachment A at pp. 8-9, 12-13.) In the context of equal protection challenges, this Court has explained that "it is irrelevant whether the perceived reason for the challenged distinction *actually* motivated the

(continued...)

This Court therefore should grant review to settle the important question whether the judicial power properly extends to precluding the Legislature from making its chosen distinction between the proofs necessary to make felony punishment available for placement of false bombs versus placement of false WMDs.

II. THE COURT OF APPEAL'S REMEDY, REDUCING APPELLANT'S SENTENCE TO A MISDEMEANOR, IS CONTRARY TO LEGISLATIVE INTENT IN THAT IT PRECLUDES FELONY PUNISHMENT FOR APPELLANT EVEN IF THE PEOPLE COULD PROVE APPELLANT CAUSED SUSTAINED FEAR

The Court of Appeal's remedy – reducing appellant's sentence to a misdemeanor – effectively judicially reformed the statute to preclude felony punishment for appellant, irrespective of whether he caused sustained fear. In doing so, the Court of Appeal deprived the People of the opportunity to prove that appellant caused sustained fear when he placed the false bomb, thus warranting felony punishment. Because any remedy for the alleged constitutional defect should track the result that the Legislature most likely would have wanted if the statute was found unconstitutional, and because the Legislature clearly wanted the option of felony punishment for a person

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(...continued)
legislature." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201.) Rather, while a court should decline to invent a fictitious purpose that reasonably could not have been within the legislature's contemplation (*id.* at p. 1201), it is unnecessary to show that such reason actually was affirmatively contemplated. Instead, a statute's differentiation based on a challenged classification (other than race or another protected category) must be upheld against an equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification" (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481-482, internal quotation marks, emphasis, and citations omitted; *Hofsheier*, *supra*, at pp. 1200-1201). Thus, equal protection requires only that the statutory classification be rationally related to a conceivable (even if not affirmatively known to be the actual) legitimate governmental purpose.

such as appellant (who caused sustained fear), the Court of Appeal's remedy is erroneous.

In *People v. Sandoval* (2007) 41 Cal.4th 825, this Court clarified that a statute could be judicially reformed to render it constitutional. If the Legislature's intent would best be furthered by revising the statute rather than invalidating it, the judiciary has the authority to revise the statute in a manner that avoids constitutional problems. (*Id.* at pp. 844, 845.) For this proposition, the *Sandoval* court relied on, inter alia, *People v. Roder* (1983) 33 Cal.3d 491, 499-502. (*People v. Sandoval*, *supra*, at p. 844 & fn. 7.) In *People v. Roder*, *supra*, at page 504, this Court invalidated the defendant's conviction for receiving stolen property under section 496 because the statute "created an unconstitutional presumption that relieved the prosecution of its burden of proving every element of the offense beyond a reasonable doubt." (*People v. Sandoval*, *supra*, at p. 844, fn. 7.) However, this Court reformed the statute in a constitutional manner – to create only a permissive inference rather than a mandatory presumption – for purposes of future prosecutions and also *for retrial of Roder's case*. (*People v. Roder*, *supra*, at pp. 505-507.)

Here, even if the Court of Appeal's equal protection analysis is correct, the result that most closely matches what the Legislature intended would be to require the People to prove sustained fear under the false bomb statute as a condition to retaining the felony sentence. The false WMD statute, enacted later in time, specifically made felony punishment available when sustained fear was proven. It is difficult to imagine the Legislature, which made felony treatment available for both false bombs and false WMDs at least when there is fear, would prefer that felony treatment simply be *unavailable* for a defendant who placed a false bomb – and yet that is the result that the Court of Appeal has reached. The Court of Appeal recognized the importance of ascertaining the Legislature's intent when

considering the appropriate remedy for an unconstitutional statute (Attachment A at p. 14), and declared it would not foreclose the possibility of prosecutors proving sustained fear to obtain felony punishment for placement of false bombs (*id.* at p. 14, fn. 6). However, the result in this case does not comport with that statement, for the Court of Appeal has foreclosed felony punishment for appellant. (*Id.* at p. 15.)

Such a result should be "reject[ed] out of hand" (*People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1208), given the clear intent to make felony punishment at least *available* for appellant's conduct of placing a false bomb, and given the longstanding policy by the electorate and the Legislature to make *any* current felony an appropriate trigger to *end* a lengthy and harmful criminal career. (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)). That policy "serve[s] an important and vital public purpose" (*People v. Hofsheier*, *supra*, at p. 1208) of preventing continuance of such a career of crime – which the Court of Appeal has frustrated by ordering that appellant shall be released promptly, leaving him free to continue terrorizing the public.

Here, the People proved beyond a reasonable doubt that Turnage committed the offense enacted by the Legislature, and he received the felony punishment prescribed by the Legislature. Even assuming that there was some further condition required by the Constitution before the Legislature's intended punishment could be imposed, it is not logical to suppose the Legislature would have preferred to preclude felony punishment for appellant, rather than allowing the People to take whatever remedial step was required by the Constitution.

It was manifestly wrong, therefore, for the Court of Appeal not to effect that remedy. The Court of Appeal actually conceded that the dispatcher who saw the false bomb "was scared," believed the object could be a bomb, and treated it accordingly. (Attachment A at pp. 4-6.) In

addition, the dispatch center was evacuated. (IRT 43.) This falls within section 11418.5, subdivision (b)'s definition of "sustained fear," which "can be established by, but is not limited to, conduct such as evacuation of any building by any occupant . . . ." Moreover, the summoning of the bomb squad and the bomb squad's examination of the false bomb was equivalent to "any isolation, quarantine, or decontamination effort." (§ 11418.5, subd. (b); IRT 201-212, 216-218.)

Assuming the Constitution could not permit the offense of placing a false bomb to result in the already prescribed sanction of felony punishment unless such offense was also affirmatively proven to have resulted in sustained fear, then the important public purpose of ending criminal careers should have permitted the People to make such remedial proof.

In his answer to respondent's petition for rehearing below, appellant asserted that the already-legislatively-prescribed felony punishment for violating section 148.1(d) should not be permitted even upon proof of sustained fear. He claimed that when a statute violates equal protection, a reviewing court has only two choices for the remedy: (1) it can invalidate the statute; or (2) it can extend the benefits to the party aggrieved. Citing *Kopp v. Fair Political Practices Com.* (1995) 11 Cal.4th 607 (*Kopp*), appellant argued that permitting felony punishment upon proof of "sustained fear" improperly rewrites section 148.1(d) to judicially create a new crime with a new element. (Answer at pp. 7-12.)

But such argument fundamentally misses the mark. Appellant already stands convicted of the offense enacted by the Legislature, and he already faces the felony punishment authorized by the Legislature for that offense as enacted. It is the judicial branch (through the Court of Appeal) which has found that such punishment should be constitutionally conditioned upon proof of sustained fear. But if such additional constitutional condition – external to the statute as written by the Legislature – is required, then the

proper remedy is to permit such constitutional condition to be met. (See, e.g., *People v. Hofsheier*, *supra*, 37 Cal.4th at pp. 1208-1209 [where legislatively sanctioned requirement of registration may only be constitutionally imposed by having judge exercise judicial discretion, proper remedy is to remand so that condition may be met].)

Kopp itself supports such a result. *Kopp* noted that courts have extended the reach of underinclusive criminal statutes in order to avoid invalidity under equal protection principles. (*Kopp*, *supra*, 11 Cal.4th at p. 637.) *Kopp* cited several sister state cases which have extended (i.e., reformed) criminal statutes in response to equal protection concerns: *People v. Liberta* (1984) 64 N.Y.2d 152, 485 N.Y.S.2d 207, 218-219 & footnote 15, 474 N.E.2d 567, 578-579 & footnote 15, citing additional cases (extending reach of rape law to married men who rape their wives and females who rape males); *Plas v. State* (Alaska 1979) 598 P.2d 966, 968-969 (extending coverage of prostitution statute to males); *State v. Books* (Iowa 1975) 225 N.W.2d 322, 325 (extending bribery statute to cover unlawful receipt of gifts to state as well as county employees). (*Kopp*, *supra*, at p. 637, fn. 33.) Moreover, "the high court has endorsed the propriety of judicial reformation of statutes in the context of otherwise vague or overbroad criminal statutes – namely, criminal obscenity statutes – and has encouraged state courts to do so as well." (*Id.* at p. 638.)[5]

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[5] Indeed, *Kopp* cited a case involving a judicial rewrite at least as substantial as that proposed by respondent in the present case. (*In re Kay* (1970) 1 Cal.3d 930.) *Kay* involved a Penal Code section making it a crime for anyone to "willfully disturb[]" any lawful meeting. (§ 403.) This Court found the term overbroad because it would criminalize protected speech under the First Amendment. To preserve the statute, this Court construed it to require that the defendant substantially impaired the conduct of the meeting by intentionally committing acts in violation of implicit customs or of explicit rules for governance of the meeting, of which he knew, or as a

(continued...)

Here, there is no need to *extend* the reach of section 148.1(d) to permit felony punishment for placing a false bomb. To the contrary, by its own terms – in place long before appellant violated and was convicted for violating the statute – it *already* provides for such felony punishment as written. The only thing urged by respondent here is that, where the judicial branch finds itself obliged to find there must be an additional condition to permit the punishment prescribed by the Legislature, the judicial branch can hardly reject the option permitting the People to meet that judicially-imposed condition in order to effectuate the punishment intended by the Legislature.

In his answer to respondent's petition for rehearing in the Court of Appeal, appellant also argued that if "sustained fear" is added to section 148.1(d), he may not be retried for the "new crime" with the "extra sustained fear element." (Answer, at pp. 7-8, citing § 1023 (double jeopardy) and *People v. Anderson* (2009) 47 Cal.4th 92, 113-114.) Further, appellant asserted that the new element of sustained fear under section 148.1(d), could not be retroactively applied to appellant because his conduct occurred before the grafting of the new element to the statute. Just as the Legislature is barred by the ex post facto clause from passing a retroactive law, his argument stated, a court is barred by the due process clause from achieving the same result by judicial construction. (Answer at pp. 8-9.)

But, as stated above, that fundamentally misses the mark because appellant already stands convicted of the offense enacted by the Legislature, and already faces the punishment which the Legislature itself

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(...continued)
reasonable person should have known. (*In re Kay*, *supra*, at p. 943; *Kopp*, *supra*, 11 Cal.4th at p. 644, fn. 39.)

authorized as sanction for the offense as written. Thus, there can be no double jeopardy problem. Rather, this case involves the Court of Appeal's conclusion that the punishment prescribed by the Legislature for the offense enacted by the Legislature can only be obtained, consistent with the Constitution, if there is proof of sustained fear from appellant's offense. Judicial imposition of the condition – a condition which is in fact external to the legislative terms – must be concommitant with an opportunity to remedy the matter by meeting the condition.

This Court's decision in *People v. Roder*, *supra*, 33 Cal.3d at pages 505-507, likewise disposes of appellant's retroactive application argument. As noted, in *Roder* this Court reformed the law against receiving stolen property (§ 496), turning a mandatory presumption into a permissive inference, to render the statute constitutional. (*Id.* at pp. 504-507.) This Court then remanded the case so that Roder could be retried under the reformed statute, noting "On remand, the trial court should fashion an appropriate instruction, which informs the jury of the permissive inference but at the same time makes clear that the prosecution retains the burden of proving every element of the offense beyond a reasonable doubt. [Citation.]" (*People v. Roder*, *supra*, 33 Cal.3d at p. 507.)

Here, no full retrial is needed at all. To the contrary, in the event some additional matter must be proven for the Constitution to permit an in-place legislative sanction to apply based on proof of elements already prescribed by that legislative body, there is no legitimate argument against permitting such additional matter to be proven. (See *Cunningham v. California* (2007) 549 U.S. 270, 286, 294 [where Constitution itself imposes requirement of an additional jury proof – to allow punishment already authorized by legislatures upon more limited proofs to jury – constitutionally permissible remedy includes allowing such external constitutionally-imposed condition to be met on remand].) Thus, were the

Court of Appeal correct to find an equal protection violation at the outset, there is no legitimate argument that the People should be barred from a remand to prove appellant's offense resulted in sustained fear, as the condition to retaining the legislatively prescribed felony punishment for the offense enacted by the Legislature.

Accordingly, in the event this Court does not reverse the Court of Appeal's ruling that the statutory scheme violates equal protection, respondent respectfully submits this Court should grant review and order remand to permit an opportunity to prove sustained fear as a condition to retaining the present felony punishment for appellant's offense.

CONCLUSION

The petition for review should be granted.

Dated: May 10, 2010

Respectfully submitted,

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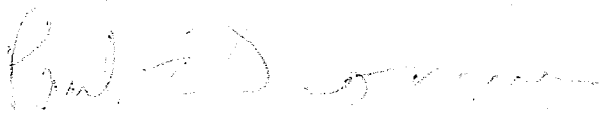

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 4,714 words.

Dated: May 10, 2010

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EXHIBIT A

Filed 4/1/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. BARRY ALLEN TURNAGE, Defendant and Appellant.	C059887 (Super. Ct. Nos. 06-5019, 04-1665)

APPEAL from a judgment of the Superior Court of Yolo County, Thomas E. Warriner, Judge. Affirmed as modified.

Peggy A. Headley, under appointment by the Court of Appeal, for Defendant and Appellant.

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INTRODUCTION

A jury convicted defendant Barry Allen Turnage of maliciously placing a false or facsimile bomb in 2006 with the

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts IB, IIA, IIB, III, and IV of the Discussion.

intent to cause others to fear for their safety (Pen. Code, § 148.1, subd. (d)),[1] found he was legally sane at the time of the commission of the offense, and found he had two prior convictions that came within the meaning of section 667, subdivision (d). Based on the evidence it heard at trial regarding the present offense, the trial court found that defendant violated his probation in a 2004 drug case, in which there was a suspended imposition of sentence. The court sentenced defendant to state prison for the upper term on the 2004 offense, with a consecutive indeterminate prison term of 25 years to life for the present offense. (§ 667, subd. (e)(2)(A)(ii).)

On appeal, defendant contends his felony sentence for placing a false bomb violates his constitutional right to equal protection, because placing a false weapon of mass destruction (WMD) under similar circumstances (without causing "sustained fear") is only a misdemeanor (§§ 11418.1, 11418.5, subd. (b)), and to due process, because "false or facsimile bomb" is too vague a term. He contends the trial court should have granted his motion for acquittal (§ 1118.1) because there was insufficient evidence of a false bomb, or of his intent to cause others to fear for their safety. He also claims that there is insufficient evidence to support the recidivist finding based on his 1985 entry of a guilty plea, because the 1985 court did not

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[1] All further statutory references are to the Penal Code.

have jurisdiction to accept a withdrawal of his 1978 plea of not guilty by reason of insanity (NGI) to the charge. Finally, he contends that if we reverse his present conviction we must reverse the court's finding that he violated probation and remand for further proceedings in the 2004 case.

In the published portion of this opinion, we agree that defendant is similarly situated to someone convicted of the misdemeanor of placing a false WMD that did not cause sustained fear, and the legislative history of the latter provision shows that no reason exists to treat the two offenses differently for purposes of punishment. Therefore, we conclude that a violation of section 148.1, subdivision (d) (hereafter § 148.1(d)) is punishable only as a misdemeanor. We reject the remainder of defendant's arguments in the unpublished part. We therefore vacate the sentence on the 2006 offense and remand the matter for resentencing.

FACTS

The Yolo County Communications Center (YCCC) in Woodland is the 24-hour dispatch headquarters for the county's police, fire, and ambulance services. It is located in the middle of a parking lot, surrounded by other buildings. In order to enter the parking lot, a driver must stop at a key pad that activates a gate.

In September 2006 a YCCC dispatcher was returning from a coffee run on a Sunday morning. As she approached the road leading to the gate, she noticed a maroon Ford Thunderbird that was backing up. She testified that she remembered the car

clearly because it was similar to the car of a dispatcher who had recently left the job. However, her suspicions were aroused when the driver leaned over toward the passenger side in a maneuver that looked uncomfortable and struck her as unusual, as if he were trying to conceal his face.

As the dispatcher passed the Thunderbird and approached the key pad, she saw a box underneath it with a flag sticking out of its top and "C-4" written on the side facing her.[2] This had not been there when she left 15-20 minutes earlier. She was scared, because she knew C-4 was an explosive and thought that this might be a bomb, even though it did not have any external indications of a fuse. She parked in her spot on the other side of the building. When she entered the YCCC, she announced to the others in the room that there was a bomb threat, and she placed a telephone call to the police instead of using the radio because the latter could trigger some types of bombs. The employees waited inside for the police to arrive, which took about 15 minutes. By this time, her shift had ended and she walked outside to meet the police. No one else left the building, and as far as the dispatcher could recall the YCCC operations were not interrupted.

A police officer who heard the bomb report saw a maroon Thunderbird parked in front of a nearby coffee shop. Through

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[2] Although the writing is not legible, we have included a photograph of the box as an appendix to this opinion; the bomb itself was an exhibit at trial.

the coffee shop window, the officer saw defendant, who matched the general description of the driver of the Thunderbird. He was drawing on some newspapers. The officer entered the coffee shop and asked defendant if he could speak with him outside. Defendant responded calmly in an amenable manner, and he and the officer left the shop. Defendant volunteered that he had come from the sheriff's department (actually the YCCC), where he had left a box on which he had written C-4, which he knew was a plastic explosive. He claimed this was a joke, not meant for anyone in particular and not intended to cause anyone harm. However, he mentioned that he knew there were women at the YCCC who had made fun of him, which upset him. He would not be any more specific about these women. He said the box contained only a plastic bag filled with bleach and motor oil.

Another responding officer had seen defendant about 25 minutes before the bomb report at a four-way stop near the YCCC. Defendant had stared at the officer for an extended period of time, looking agitated or angry.

Among defendant's effects at the coffee shop was a disposable camera. He said he photographed various government buildings, bridges, and police officers. There were random writings on the newspaper and on a Watchtower pamphlet, ; the phrase "Angry 19" was written next to or on a drawing of a box with an antenna, and there were drawings of what appeared to be radio towers. There were also books on the supernatural and parapsychology.

In a search of defendant's apartment, which was directly north of the complex of county buildings, the police found a number of photographs. They also found photographs in the trunk of his car. These were mostly innocuous, but included pictures of the parking area for the district attorney, patrol cars, a university police station, the courthouse, the headquarters of the probation department, and the offices of the county's Department of Mental Health. They did not find any explosives or detonators. They also did not find any manifestos or other angry writings.

A few days before defendant placed the fake bomb, a worker in one of the buildings around the YCCC saw him near his car, which was parked across from the Health and Social Services building. He was pacing back and forth, and making gestures that looked like he was pretending to shoot a rifle at the building. He was someone she had seen around the premises about a dozen times in the nine-month period she had worked there. His actions frightened her. She reported this to the police.

A bomb expert testified that actual bombs frequently do not appear to be bombs. C-4 is an explosive of high strength. The small size of the box did not diminish the possible power of the bomb. The flag could have been an antenna. Only after x-raying the box and not seeing any solid materials or power sources did he feel comfortable about opening it. Only then was he able to confirm that it did not contain an explosive or a detonator.

A psychologist testified about her evaluation of defendant. He had paranoid beliefs that, among other things, the officers

at the jail wanted to have sex with him. His thinking in general was fragmented and tangential. In discussing the charges against him, he said he had placed the bomb to scare off women who had been sexually harassing him and wanted to kill him because they "wanted to get rid of all the blacks" as "they're too smart." Defendant had a history of psychiatric treatment for schizophrenia dating back to 1983. In a later interview, he claimed the fake bomb was just a joke, but again alluded to the need to scare off women interested in him. He was aware his attorney was trying to have him found incompetent to stand trial, which upset him because he did not "want to go that route."

Defendant does not raise any issues with respect to the sanity phase of his trial. We therefore omit those facts.

DISCUSSION

I

A. Equal Protection

1

In its other provisions, section 148.1 punishes knowingly false *reports* of bombs to peace officers or other people as a "wobbler" with imprisonment in state prison or up to a year in jail. (§ 148.1, subds. (a)-(c).) In § 148.1(d), the text of which was added as subdivision (c) in 1972 (see Stats. 1972, ch. 1142, § 1, p. 2210), the statute similarly punishes persons responsible for maliciously placing, sending, or possessing "any false or facsimile bomb, with the intent to cause

[others] to fear for [their] personal safety or the safety of others . . . ."

In 1999, concerned with the increasing threat of terrorism that made use of chemical, biological, nuclear, and radiological agents (§ 11416), often with dispersal methods that included explosive devices (§ 11417, subd. (a)), the Legislature enacted a new offense of producing, possessing, or using WMDs (§ 11418). In 2002 the Legislature added section 11418.1 to penalize any person who places, sends, or possesses "any false or facsimile of a [WMD], with the intent to cause [others] to fear for [their] own safety, or for the . . . safety of others," punishable *only* as a misdemeanor except where this "causes another person to be placed in sustained fear"[3] (in which case the conduct is punished as a wobbler).

In the legislative history for section 11418.1 (Sen. Comm. on Pub. Safety, analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.) as amended Mar. 7, 2002), of which we have taken judicial notice at defendant's request,[4] the analysis directly poses the question of whether the Legislature should create a new wobbler drawn from section 148.1(d) for placement of false WMDs causing

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[3] Among the nonexclusive examples in the cross-referenced definition of sustained fear are evacuations of buildings, or isolation, quarantine, or decontamination efforts. (§ 11418.5, subd. (b).)

[4] This is a properly cognizable category of legislative history for purposes of judicial notice. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 32-35.)

sustained fear, and a misdemeanor when sustained fear is not present. (Sen. Comm. on Pub. Safety, analysis of Assem. Bill No. 1838, *supra*, at pp. 2-3.) According to this analysis, "From discussions with the sponsor of AB 1838, it appears that the new WMD hoax crime was modeled on the bomb threats statute because police and prosecutors are familiar with the existing crime. Further, it was believed that *since the conduct in both crimes is similar, the penalties should be similar.*" (Sen. Comm. on Pub. Safety, analysis of Assem. Bill No. 1838, *supra*, at p. 18, italics added.) In discussing the creation of a new felony in the context of the additional punishment for recidivism, the analysis identified a reluctance to add nonviolent felonies that could be subject to this treatment, but believed the element of sustained fear was equivalent to the harm from violent conduct. (*Id.* at pp. 19-20.)

2

The constitutional right to equal protection of the law, under either the federal or state charter (U.S. Const., 14th Amend.; Cal. Const., art I, § 7), is in essence a requirement that all persons similarly situated be treated alike (*Niedle v. Workers' Comp. Appeals Bd.* (2001) 87 Cal.App.4th 283, 288). Except where a "suspect" class or "fundamental" right is involved (neither of which is at issue in the present case), the legislative classification must bear a "rational" relationship to any legitimate state purpose that a court can posit. (*Id.* at pp. 288-289.)

Initially, the People contend that defendant has forfeited this issue because he did not raise it initially in the trial court. As defendant correctly points out, where the claim of error does not trample concerns of judicial efficiency, involves only the application of legal principles of law to undisputed facts (without depriving the People of the opportunity to have developed essential facts in opposition), and presents an issue of important public concern (such as the constitutionality of a statute in a case of first impression), we will generally exercise our discretion to allow a party to raise the issue for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888 & fn. 7 (*Sheena K.*); *In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323.) The case before us satisfies these standards, so we will proceed to the merits.

3

The threshold question is whether defendant has shown that "the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 (*Hofsheier*).) That similar conduct might be punished as different crimes under different statutes does not shield the classification from scrutiny. (*Ibid.*)

Defendant, as noted, posits that persons convicted under section 148.1(d) and those convicted under section 11418.1 have both placed, sent, or possessed a false object with the intent to cause fear (but without causing sustained fear); the only distinction is the *type* of object—a false or facsimile bomb

under section 148.1, or a false or facsimile WMD under section 11418.1.[5] As in *Hofsheier*, the conduct is identical except for a variance with respect to the particular form of the conduct. (37 Cal.4th at p. 1199 [intercourse and oral copulation are both forms of sexual conduct with a minor].) This is sufficient to trigger our scrutiny of the classification. (Cf. *ibid.*)

The People argue that there was evidence at trial from which we could conclude that defendant in fact caused sustained fear and therefore is not similarly situated with a misdemeanant violator of section 11418.1, and he therefore lacks standing to assert the claim. This argument is not well taken. The People do not provide any authority for the proposition that in a challenge to the *facial* constitutionality of the statute we must consider circumstances that are not part of the statutory definition of the crime and that were not the subject of any jury finding. Defendant does not contend there is anything about the particular circumstances of his offense that render his punishment a constitutional violation as applied to him (such as with claims of cruel and unusual punishment). "We are unconvinced by the People's proposed approach, which would require us to look beyond the statutory elements of the offense [defendant] admitted." (*In re J.P.* (2009) 170 Cal.App.4th 1292, 1299 [rejecting People's argument that minor not similarly

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[5] As defendant notes, had he written "anthrax" on the box, he would have been guilty of only a misdemeanor.

situated because facts of case showed he *could have* been convicted of *different* crime (that was not an *included* offense) for which all offenders receive identical treatment]; accord, *People v. Ranscht* (2009) 173 Cal.App.4th 1369, 1374-1375.) We thus do not need to consider defendant's arguments regarding the sufficiency of the evidence to prove sustained fear.

4

The legislative history we have quoted above (*ante*, at p. 9) expressly noted a view that the conduct underlying sections 148.1(d) and 11418.1 were the same and warranted identical punishment. The analysis overlooked, however, the fact that a false WMD carries the same wobbler penalty as a false bomb only where there is proof of an *additional* element of *sustained* fear that justified the creation of a new nonviolent felony subject to additional punishment in the event of recidivism. In light of this, we cannot divine any plausible reason why a conviction for placing a false bomb *without* causing sustained fear should subject a defendant to a felony conviction under section 148.1(d) but only a misdemeanor conviction under section 11418.1 for a false WMD, given the goals that the Legislature articulated. The fear of a false WMD, given the more far-reaching effects of such devices, would generally be more severe (even in the absence of sustained fear) than only an explosive device whose destructive effects could be more easily evaded, and yet the former incurs the lesser punishment.

The People offer the tenet that courts do not require the Legislature to enact a comprehensive response to a problem and

may address it in piecemeal efforts. (*Hofsheier, supra*, 37 Cal.4th at p. 1205.) However, as in *Hofsheier*, the "argument does not fit this case." (*Id.* at p. 1206.) The People have not identified any ongoing legislative examination of nonviolent felonies to determine which address conduct that is properly the subject of additional punishment for recidivism. (Cf. *ibid.* [no showing of ongoing legislative fine-tuning of registration statute to eliminate distinctions between intercourse and oral copulation with minors].) Moreover, the Legislature first added the text of section 148.1(d) in 1972, and has not modified it since 1991 (when it added possession to the list of acts, and changed the definition from an intent that another person think it is a real bomb to an intent to cause fear); nor has it modified any other part of the statute since 1984, other than to add categories of peace officers to whom a false bomb report is punishable under section 148.1, subdivision (b). (Compare Stats. 1998, ch. 760, § 1; Stats. 1991, ch. 503, § 1, p. 2447; Stats. 1984, ch. 824, § 1, pp. 2849-2850.) The 1991 revisit antedates the sea change of harsher treatment of recidivism that began in earnest in 1994 and continues to the present, and thus the rationale for treating the placement of a false bomb without sustained fear as a wobbler has eroded over time, given the legislative history of section 11418.1. (Cf. *Hofsheier, supra*, 37 Cal.4th at p. 1206 [harsher treatment of oral copulation arose at time when it, unlike intercourse between consenting adults, was illegal].)

Defendant's felony punishment has therefore violated his right to equal protection. This leaves the question of remedy.

5

Without any authority, defendant simply asserts that we must reverse his conviction. We reject this claim. Defendant's conduct is still a crime. It is merely the degree of *punishment* that violates his right to equal protection.

A court may choose between extending beneficial treatment to the disfavored class or withdrawing it from the favored class. (*Hofsheier, supra*, 37 Cal.4th at p. 1207.) The primary concern is to ascertain the Legislature's preferred alternative. (*Ibid.*) As the distinction the Legislature has drawn in section 11418.1 is its most recent explicit consideration of the punishment that a false destructive device merits, and an articulation of its general policy for when a nonviolent crime merits felony treatment, we believe defendant should have the benefit of the lenience that the Legislature has declared with respect to false WMDs that do not cause sustained fear (rather than disregarding the efforts in section 11418.1 to tailor a distinction). We therefore conclude that placing a false bomb within the meaning of section 148.1(d), which does not include the element of causing sustained fear as defined in section 11418.5, is only a misdemeanor.[6] This conclusion does

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[6] We do not decide whether the People may seek a special jury finding of sustained fear in order to punish the offense as a felony.

not prevent the Legislature from deciding to add sustained fear as an element of section 148.1(d) or finding some other way of keeping the punishment parallel with section 11418.1 in order to impose the same punishment on both groups of offenders. (Cf. *Hofsheier, supra*, 37 Cal.4th at p. 1206.)

As a result, the sentence for defendant's violation of section 148.1(d) is now reduced from a minimum indeterminate term in prison of 25 years to life to no more than one year in county jail. We must remand the matter to the trial court to determine the length of his jail term on the present offense and the manner in which it wishes to structure his overall sentence.

B. Due Process

Defendant also contends the phrase "any false or facsimile bomb" does not adequately describe the type of object coming within its ambit. He argues that the statute is therefore unconstitutionally vague, both facially and as applied to the facts of this case.

Once again, the People contend defendant has forfeited this claim because he did not raise it in the trial court. We reject their argument for the same reasons previously stated.

1

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning'" that prevents arbitrary enforcement and gives adequate notice. (*Sheena K., supra*, 40 Cal.4th at p. 890.) To be unconstitutionally vague, the statute must employ terms the meaning of which causes people of

common intelligence to guess what conduct is either required or prohibited. (*Ibid.*)

Defendant acknowledges that "bomb" is a term of common understanding. (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25 ["Persons of common intelligence know what a bomb is"; rejecting claim of need for instructional definition of term as used in § 12301]; *People v. Quinn* (1976) 57 Cal.App.3d 251, 259 [term "bomb" in § 12301 not unconstitutionally vague].) He claims, however, that "false or facsimile" does not adequately limit the entire spectrum of items that are not actual bombs.

Defendant splits hairs in focusing only on the use of the term "false or facsimile bomb" in his claim that one reasonably cannot tell which objects are prohibited. It is not the object alone, but the object coupled with an intent to cause fear in another that is prohibited. If a person of common intelligence understands the nature of a bomb, then that person will know which objects will cause fear in another from their deceptive similarity to a bomb. Defendant or others need not fear that leaving their hats behind will be mistaken for placing a false bomb unless there is some external indication that it contains an explosive and a detonation device. We therefore reject this claim of vagueness.

2

Defendant also argues that the statute is unconstitutional for vagueness as applied to him, as he could not reasonably have known others would consider his object to be a bomb. He asserts in essence that the box at most proclaimed that it might have an

explosive inside and did not give any indication of a detonation device.

People of common intelligence now live in a world where they must remove even shoes for screening in airport security because of the possibility that they could contain a concealed explosive device. We are also sadly in an era in which people have expressed their discontent with the government through the destruction of public buildings. Placing an object that at least boasts of its explosive nature near a government building would indicate to anyone of common intelligence that the object could be considered a bomb even without any external indication of a detonation device concealed within. We therefore reject this claim of vagueness.

II

A. Sufficient Evidence—Bomb

Defendant argues the prosecution evidence showed only that he placed a false "explosive," which is not punishable under section 148.1(d). He asserts that expert testimony regarding the features of a bomb was necessary in order to support the jury's verdict that this false explosive was a false bomb. He contends that the "lay opinion[s]" of other witnesses regarding whether his hoax was a bomb are insufficient to support the verdict because they lacked foundation of any prior experience with bombs. Consequently, the court erred in denying his motion to dismiss at the conclusion of the prosecution case.

This was not the actual basis of the motion to dismiss. The motion instead focused on the issue we next discuss, i.e.,

whether there was sufficient evidence of an intent to instill fear. We will, however, treat this simply as an argument regarding the insufficiency of the evidence.

Defendant's claim regarding the need for expert testimony is in essence a rehash of his argument that the term "false or facsimile bomb" is vague. Jurors of common understanding comprehend that a false bomb must appear to be a device capable of exploding upon the triggering of its fuse. As a result, the jurors were capable of determining by themselves whether the testimony establishing that C-4 is an explosive (including defendant's own admission to that effect) demonstrated that defendant placed a false bomb, without either expert or lay opinion testimony to that effect.

B. Sufficient Evidence—Intent

Coming to the actual basis of defendant's motion to acquit, he reiterates that the prosecution produced insufficient evidence of his intent to induce fear in another. In this regard, he relies on the innocuous circumstances of the object and its placement, the absence of any particular animus toward the YCCC or any of its employees, the lack of any extreme reaction on the part of YCCC employees, his availability for police questioning afterward, and his self-serving assertion of intending only a joke. The argument lacks merit.

Regarding the appearance and placement of the false bomb, we have already noted that in the present day one can rationally fear that the most innocuous of objects—even shoes—might be a

bomb. We have reviewed the pictures of defendant's box in the record. While it might not appear threatening of itself, the context of the placement of a box labeled with the name of an explosive and a flag near the entrance to the unguarded parking lot of a government facility allows for a rational inference that he intended to scare employees driving through the gate. Indeed, even the bomb expert was wary of the object.

It is not necessary that defendant have an animus toward any person in particular at the YCCC. His particular reliance on *People v. Lake* (2007) 156 Cal.App.4th Supp. 1, 9, for this proposition is not well-placed, as the solicitation statute at issue in that case required knowledge of the likely presence at the proposed location of third parties whom the solicited acts would offend.[7] In any event, there was evidence of his irrational need to scare off unspecified individuals at the YCCC in particular, and apparent hostility to county offices in general, as demonstrated in the imaginary rifle incident and his glaring at the police officer at the intersection.

His efforts to minimize the response at the YCCC to his "joke" are unavailing. Both the YCCC and the police treated the object as a bomb, as did the bomb expert.

This leaves his failure to flee the area after placing the bomb, his cooperative response to police questioning, and his

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[7] We do not need to respond to his remaining citations to other cases involving other crimes and the insufficiency of evidence of intent in those appellate records. (*State Compensation Ins. Fund v. Brown* (1995) 32 Cal.App.4th 188, 202 & fn. 5.)

disavowal of any intent to scare anyone. We are not obligated to accept his self-serving disavowals of an intent to scare, particularly in light of his admissions of his perceived difficulties with officers that he needed to scare.

III

As we have reduced defendant's present conviction to a misdemeanor, he no longer satisfies the criterion of incurring a *present* felony conviction (§ 667, subd. (c)), required to impose an indeterminate life sentence on it (§ 667, subd. (e)(2)(a)(ii)). This moots his claim regarding the sufficiency of the evidence to support the finding that his 1985 guilty plea satisfies the additional criterion of *prior* qualifying convictions. (§ 667, subd. (d).)

IV

Defendant asserts that if we reverse his conviction for placing a false bomb, then we must vacate the finding of a violation of probation and remand because it is not clear whether the court based its finding on the mere fact of his conviction rather than on the evidence adduced at trial. (Compare *People v. McNeal* (1979) 90 Cal.App.3d 830, 840, fn. 3 [where court affirmatively indicates it relied on *evidence* rather than mere fact of conviction, no need to vacate and remand finding of probation violation]; *People v. Hayko* (1970) 7 Cal.App.3d 604, 611 [only specified basis for finding of probation violation was fact of conviction; must vacate and remand].)

As we have already stated, defendant is not entitled to a *reversal* of his conviction. We therefore reject this argument.[8]

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated, and the matter remanded for sentencing on the violation of section 148.1(d) as a misdemeanor.

RAYE, Acting P. J.

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.

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[8] The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as he had prior convictions for a serious or violent felony. (Pen. Code, § 4019, subds. (b)(2) & (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Barry Allen Turnage** No.: **S**_____

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 11, 2010, I served the attached **Petition for Review** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 10, 2010, at Sacramento, California.

_____
Declarant

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