599 P.2d 1364
25 Cal.3d 414

[414] **In re Thad C. ANDERS on Habeas Corpus.**

Cr. 20198.

Supreme Court of California, In Bank.

Oct. 4, 1979.

Defendant on application for writ of habeas corpus objected to alleged illegal search. The Supreme Court, Tobriner, J., held that: (1) contention that officer's observation on basis of which prosecution was brought constituted illegal search was not cognizable on habeas corpus, but (2) defendant whose conviction for solicitation to engage in or engaging in lewd or dissolute conduct in public place was final was entitled to review by writ of habeas corpus, but for inadequacy of record, under a previous retroactive decision which adopted a narrow and specific construction of the statute, and rather than referring matter to referee for further evidence, the receipt and evaluation of such evidence was deemed a matter to be more conveniently handled by the trial court.

Order to show cause discharged and petition for writ of habeas corpus denied without prejudice.

Clark, J., dissented and filed opinion.

1. Habeas Corpus ⇐25.1(2)

Contention that officer's observation on basis of which prosecution was brought constituted illegal search was not cognizable on habeas corpus.

2. Habeas Corpus ⇐112

Defendant whose conviction for solicitation to engage in or engaging in lewd or dissolute conduct in public place was final was entitled to review by writ of habeas corpus, but for inadequacy of record, under previous retroactive decision which adopted narrow and specific construction of statute, and rather than referring matter to referee for further evidence, the receipt and evaluation of such evidence was deemed to be matter more conveniently handled by trial court and thus appropriate disposition was to deny application, without prejudice. West's Ann.Pen.Code, § 647(a).

Robert D. Carpenter, Los Angeles, under appointment by the Supreme Court, for petitioner.

Gordon & Hatler, Albert L. Gordon, Ray A. Hatler, Los Angeles, Margaret C. Crosby, Alan L. Schlosser, Amitai Schwartz, San Francisco, Jill Jakes, Fred Okrand, Mark Rosenbaum, Terry Smerling, Los Angeles, Donald C. Knutson, Jerel McCrary and Donald M. Solomon, San Francisco, as amici curiae on behalf of petitioner.

Burt Pines, City Atty., Ward G. McConnell, Asst. City Atty., and Mark L. Brown, Deputy City Atty., for respondent.

Evelle J. Younger, Atty. Gen., Jack R. Winkler, Chief Asst. Atty. Gen., S. Clark Moore, Asst. Atty. Gen., Shunji Asari and John A. Saurenman, Deputy Attys. Gen., as amici curiae on behalf of respondent.

[414] TOBRINER, Justice. [416]

Petitioner Anders brings habeas corpus to challenge his conviction and punishment for a violation of Penal Code section 647, subdivision (a), which provides that every person "Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or any place open to the public or exposed to public view" is guilty of disorderly conduct. The conviction rests on the testimony of a police officer that he observed petitioner masturbating in a closed pay toilet stall in a bus station restroom. The door to the toilet stall was solid, except for two 12- by 18-inch wire mesh grates; the officer looked through the upper grate to observe petitioner's conduct.

[1] Petitioner primarily argues that the officer's observation constituted an illegal search. (See *Britt v. Superior Court* (1962) 58 Cal.2d 469, 24 Cal.Rptr. 849, 374 P.2d 817; *Bielicki v. Superior Court* (1962) 57 Cal.2d 602, 21 Cal.Rptr. 552, 371 P.2d 288.) That contention is not cognizable on habeas corpus. (*In re Sterling* (1965) 63 Cal.2d 486, 47 Cal.Rptr. 205, 407 P.2d 5.)

[2] Petitioner may, however, be entitled to relief under our recent decision in *Pryor v. Municipal Court*, 25 Cal.3d 238, 158 Cal. Rptr. 330, 599 P.2d 636. In that case we adopted a narrow and specific construction of Penal Code section 647, subdivision (a), in order to overcome charges that the section as written and previously construed was unconstitutionally vague. We construed the statute "to prohibit only the solicitation or commission of conduct in a public place or one open to the public or exposed to public view, which involves the touching of the genitals, buttocks, or female breast, for purposes of sexual arousal, gratification, annoyance or offense, by a person who knows or should know of the presence of persons who may be offended by the conduct." (p. 333 of 158 Cal.Rptr., p. 639 of 599 P.2d.)

With respect to the retroactivity of our decision, we stated that a defendant whose conviction is final, such as petitioner in the instant case, would be entitled to relief by writ of habeas corpus "if there is no material dispute as to the facts relating to his conviction and if it appears that the statute as construed in this opinion [*Pryor v. Municipal Court*] did not prohibit his conduct." (p. 342 of 158 Cal.Rptr., p. 648 of 599 P.2d.)

The record in the present proceedings was compiled before the filing of our decision in *Pryor v. Municipal Court, supra.* (p. 330 of 158 Cal.Rptr., p. 636 of 599 P.2d.) It
417 does not touch upon questions crucial to the application of the statute as construed in *Pryor* to the instant conviction, in particular, the question whether petitioner knew or should have known of the presence of persons who may be offended by his act. We therefore cannot grant petitioner the requested relief on the basis of the present record.

Having issued an order to show cause, we could refer this matter to a referee for the taking of further evidence in light of our decision in *Pryor v. Municipal Court, supra.* We believe, however, that the receipt and evaluation of such evidence is a matter more conveniently handled by a trial court. Accordingly, we conclude that the proper disposition of this case is to deny Anders' application but without prejudice to his right to seek relief by writ of habeas corpus in a proper court below.

The order to show cause is discharged and the petition for writ of habeas corpus is denied without prejudice.

BIRD, C. J., and MOSK, RICHARDSON, MANUEL and NEWMAN, JJ., concur.

CLARK, Justice, dissenting.

In *Pryor v. Municipal Court, ante,* I dissented from giving retroactive effect to the narrow construction of Penal Code section 647, subdivision (a), on the ground a windfall will result to defendants—such as petitioner—validly convicted under the statute. We should discharge the order to show cause and deny the petition for writ of habeas corpus *with* prejudice.

599 P.2d 1365
25 Cal.3d 406

406 **Martin Dale EDWARDS, Plaintiff and Appellant,**

v.

R. Spencer STEELE, as Zoning Administrator, etc., et al., Defendants and Respondents.

S.F. 24034.

Supreme Court of California.

Oct. 4, 1979.

Owner of residential property who had applied for zoning variance appealed from summary judgment entered by the Trial Court, City and County of San Francisco, Ira A. Brown, Jr., in the owner's mandate action to compel compliance with decision of board of permit appeals granting the owner variance permit. The Supreme Court, Richardson, J., held that probable intent underlying city ordinance requiring board of permit appeals to fix time and place of hearing on appeal so that the hear-