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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,
v.
JEFFREY G.,
Defendant and Appellant.

A136916
(San Mateo County
Super. Ct. No. SC070623A)

Jeffrey G. appeals from an order modifying his probation pursuant to amended Penal Code section 1203.067,¹ which sets forth various new probation conditions for registered sex offenders. Our colleagues in Division 2 of this court recently concluded in *People v. Douglas M.* (2013) 220 Cal.App.4th 1068 (*Douglas M.*)—a case nearly identical to the present one—that because the presumption of prospectivity of Penal Code statutes, mandated by section 3, cannot be rebutted, the provisions of revised section 1203.067 may not be applied retroactively to probationers like appellant, who committed their offenses before the effective date of the amendment. Accordingly, the new terms and conditions of appellant’s probation containing these provisions must be stricken.

I. PROCEDURAL BACKGROUND

On February 3, 2011, appellant was charged by second amended information with one count of lewd act upon a child under 14 years of age with a 10-year age difference (§ 288, subd. (c)(1) (count 1), five counts of oral copulation upon a person

¹ All further statutory references are to the Penal Code unless otherwise indicated.

under 16 years of age (§ 288a, subd. (b)(2) (counts 2-6)), one count of sodomy upon a person under 16 years of age (§ 286, subd. (b)(2) (count 7)), one count of sodomy of an unconscious person (§ 286, subd. (f) (count 8), and one count of possession of child pornography (§ 311.11, subd. (a) (count 9)). All of the sexual conduct offenses involved the same victim; counts one through seven occurred during a two-week period in August 2001 and count eight occurred on or about December 31, 2003.

On January 25, 2011, appellant waived jury trial.² On February 3, 2011, the trial court acquitted appellant of sodomy of an unconscious person (§ 286, subd. (f) (count 8)), found the lesser of attempted sodomy upon a person under 16 years of age (§§ 664, 286, subd. (b)(2) (count 7)), and otherwise found appellant guilty as charged.

On March 21, 2011, the trial court imposed state prison for 7 years 8 months, suspended execution of sentence, and placed appellant on probation for five years. Among other conditions of probation, the trial court ordered that appellant “shall seek and maintain treatment, counseling, or therapy as directed by the probation officer.”

In August 2012, the San Mateo County Probation Department initiated proceedings to modify the terms and conditions of appellant’s probation due to the recent amendment of section 1203.067, subdivision (b). There was no allegation that appellant had violated any of the terms of his probation. Instead, as stated in the prosecution’s opposition to appellant’s objections to the proposed modification of the terms of probation, appellant’s “probation conditions are being modified as part of a mandatory statutory scheme, rather than an individual evaluation within an existing scheme.”

On October 12, 2012, over defense counsel’s objections, the trial court modified the terms and conditions of probation, pursuant to amended section 1203.067; the court stayed the order of modification for 30 days. The terms and conditions of appellant’s probation conditions were modified as follows:

² The specific facts underlying appellant’s conviction are not relevant to the issues raised on appeal.

“1. Pursuant to section 290.09 of the Penal Code, you are required to participate in and successfully complete an approved sex offender management treatment program.³

“2. Pursuant to section 1203.067 of the Penal Code, the participation in an approved sex offender management treatment program will be for a minimum of one (1) year or up to the entire term of supervised probation, as determined by the sex offender management professional in consultation with the probation officer and as approved by the Court.

“3. Submit to random polygraph examinations, and waive any privilege against self incrimination and participation in said polygraph examinations.

“4. The psychotherapist-patient privilege shall be waived, to enable communication between the sex offender management professionals and probation officer.”

On October 23, 2012, appellant filed a notice of appeal.

On January 3, 2013, we granted appellant’s petition for a writ of supersedeas and stayed the trial court’s probation modification order pending determination of the appeal.

³ Section 290.09, which was also enacted on September 9, 2010, requires, “[o]n or before July 2012,” administration of the “SARATSO [State-Authorized Risk Assessment Tool for Sex Offenders (§ 290.04)] dynamic tool and the SARATSO future violence tool,” inter alia, as follows: “Every sex offender required to register pursuant to Sections 290 to 290.023, inclusive, shall, while on parole or formal probation, participate in an approved sex offender management program, pursuant to Sections 1203.067 and 3008.” (§ 290.09, subd. (a)(1).)

II. DISCUSSION

A. *Applicable Law*

When appellant was placed on probation in 2011, the terms and conditions of his probation included those found in former section 1203.067, which provided in relevant part: “If a defendant is granted probation pursuant to subdivision (a), the court shall order the defendant to be placed in an appropriate treatment program designed to deal with child molestation or sexual offenders, if an appropriate program is available in the county.” (Former § 1203.067, subd. (b), added by Stats. 1994, ch. 918, § 1.) Former section 1203.067, subdivision (c) further provided: “Any defendant ordered to be placed in a treatment program pursuant to subdivision (b) shall be responsible for paying the expense of his or her participation in the treatment program as determined by the court. The court shall take into consideration the ability of the defendant to pay, and no defendant shall be denied probation because of his or her inability to pay.”

During appellant’s term of probation, the Legislature amended section 1203.067 as part of the Chelsea King Child Predator Prevention Act of 2010 (Chelsea King Act) (Stats. 2010, ch. 219, § 1), to provide, in relevant part: “(b) On or after July 1, 2012, the terms of probation for persons placed on formal supervised probation for an offense that requires registration pursuant to Sections 290 to 290.023, inclusive, shall include all of the following: [¶] (1) Persons placed on formal supervised probation prior to July 1, 2012, shall participate in an approved sex offender management program, following the standards developed pursuant to Section 9003, for a period of not less than one year or the remaining term of probation if it is less than one year. The length of the period in the program is to be determined by the certified sex offender management professional in consultation with the probation officer and as approved by the court. [¶] (2) Persons placed on formal supervised probation on or after July 1, 2012, shall successfully complete a sex offender management program, following the standards developed pursuant to Section 9003, as a condition of release from probation. The length of the period in the program shall be not less than one year, up to the entire period of probation, as determined by the certified sex offender management professional in consultation with

the probation officer and as approved by the court. [¶] (3) Waiver of any privilege against self-incrimination and participation in polygraph examinations, which shall be part of the sex offender management program. [¶] (4) Waiver of any psychotherapist-patient privilege to enable communication between the sex offender management professional and supervising probation officer, pursuant to Section 290.09. [¶] (c) Any defendant ordered to be placed in an approved sex offender management program pursuant to subdivision (b) shall be responsible for paying the expense of his or her participation in the program as determined by the court. The court shall take into consideration the ability of the defendant to pay, and no defendant shall be denied probation because of his or her inability to pay.” (§ 1203.067, subds. (b)-(c), amended by Stats. 2010, ch. 219, § 17, eff. Sept. 9, 2010.)

The effective date of the amended statute was September 9, 2010, but its provisions did not become operative until July 1, 2012. (See § 1203.067, amended by Stats. 2010, ch. 219 (A.B. 1844), § 17, eff. Sept. 9, 2010; § 1203.067, subd. (b).)⁴

B. Amended Section 1203.067 May Not Be Applied Retroactively

“Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent. When the Legislature has not made its intent on the matter clear with respect to a particular statute, the Legislature’s generally applicable declaration in section 3 provides the default rule: ‘No part of [the Penal Code] is retroactive, unless expressly so declared.’ We have described section 3, and its identical counterparts in other codes (e.g., Civ. Code, § 3; Code Civ. Proc., § 3), as codifying ‘the time-honored principle . . . that in the absence of an express retroactivity provision, a

⁴ “ ‘ ‘The effective date [of a statute] is . . . the date upon which the statute came into being as an existing law.’ [Citation.] “[T]he operative date is the date upon which the directives of the statute may be actually implemented.” [Citation.] Although the effective and operative dates of a statute are often the same, the Legislature may “postpone the operation of certain statutes until a later time.” [Citation.]’ [Citation.]” (*People v. Alford* (2007) 42 Cal.4th 749, 753, fn. 2.)

statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.’ [Citations.] In applying this principle, we have been cautious not to infer retroactive intent from vague phrases and broad, general language in statutes. [Citations.] Consequently, ‘“a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.” ’ [Citations.]” (*People v. Brown* (2012) 54 Cal.4th 314, 319-320 (*Brown*).)

Applying these principles to the statute at bar, the parties reach different conclusions on the retroactivity issue. The People contend the statute is unambiguous as to legislative intent, asserting that because the statute specifically states probationers placed on probation before July 1, 2012, must participate in approved sex offender management treatment programs, the statute must be construed to apply retroactively. Appellant, on the other hand, asserts that viewed in light of section 3’s presumption against retroactivity, the most tenable construction is that revised section 1203.067 applies to all probationers whose offenses occurred on or after September 9, 2010.

After briefing in the instant case was complete, our colleagues in Division 2 of this court addressed this very argument in *Douglas M., supra*, 220 Cal.App.4th 1068. In *Douglas M., supra*, 220 Cal.App.4th 1068, the court analyzed the question of revised section 1203.067’s retroactivity, in light of section 3’s presumption of prospectivity and the context in which the statute’s amendment came about. (*Douglas M., supra*, 220 Cal.App.4th at pp. 1075-1076.)

There, the court explained that revised section 1203.067 “was enacted as part of Assembly Bill No. 1844 (2009–2010 Reg. Sess.), the [Chelsea King Act] (Stats. 2010, ch. 219), which altered numerous statutes governing sex offenses and sex offenders. Although the bill was enacted in September 2010 as urgency legislation, intended to take effect immediately (*id.*, at § 29), [fn. omitted] the section 1203.067 amendments did not become operative until July 2012, almost two years later. The apparent reason for this delayed implementation is reflected in other stated requirements of the bill (see, e.g., § 9003 [requiring development and updating of standards for certification of sex offender

management professionals and programs]), which were prerequisites to application of the new provisions of section 1203.067. There is nothing in this legislative history that provides “ ‘a clear and compelling implication’ ” that the Legislature intended the revised statute to apply retroactively. [Citation.] [¶] . . . [¶] Given this context, the most reasonable interpretation of the language of amended section 1203.067, subdivision (b), regarding ‘[p]ersons placed on formal probation prior to July 1, 2012,’ is that, for those probationers whose offenses occurred between the effective date of September 9, 2010, and the operative date of July 1, 2012, their participation in—though not necessarily completion of—‘an approved sex offender management program’ would be required. [Citations.] This interpretation fulfills the Legislature’s intention that this portion of the urgency legislation would take effect immediately upon enactment, applying to probationers whose offenses occurred on or after that date, even though its provisions could not actually be implemented until July 1, 2012. [Citations.]” (*Douglas M., supra*, 220 Cal.App.4th at p. 1076.)

The *Douglas M., supra*, 220 Cal.App.4th at pages 1076-1077 court further explained that “construing the new statute as retroactive would raise serious questions about its constitutionality. First, people who were on probation before its effective date would now be required to participate in and pay for a new mandatory treatment program, even after many of them had already participated in, paid for, and perhaps completed, court-ordered treatment under their prior probation conditions. (See § 1203.067, subs. (b)(1), (c).) Second, they would have to waive both their privilege against self-incrimination and their psychotherapist-patient privilege. (See § 1203.067, subd.[s] (b)(3) & (4).) Application of these provisions retroactively to such probationers could arguably implicate the federal and state Constitutions’ prohibition against ex post facto laws. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9; see, e.g., *People v. McVickers* (1992) 4 Cal.4th 81, 84 [ex post facto clause is implicated when a new statute is both retrospective and, inter alia, ‘ ‘ ‘makes more burdensome the punishment for a crime, after its commission’ ’ ’]; *People v. Delgado* (2006) 140 Cal.App.4th 1157, 1170

[‘statutory changes that retroactively impose greater punishment in probation cases violate the ex post facto clause’].)

“These constitutional concerns further support a finding of nonretroactivity under section 3, given the rule of interpretation providing that, ‘ “[i]f a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, *or raise serious and doubtful constitutional questions*, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers.” [Citations.]’ (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509, italics added; see, e.g., *Tapia [v. Superior Court]* (1991) 53 Cal.3d [282,] 298 [refusing to apply provisions of several new statutes to crimes committed before statutes’ effective date because such application both would be ‘retrospective’ in that it would change legal consequences of defendant’s past conduct, and ‘would also likely violate the rule against ex post facto legislation, since each of these provisions appears to define conduct as a crime, to increase punishment for a crime, or to eliminate a defense’].)

“In sum, there is nothing in either the language of the statute or its legislative history clearly indicating a legislative intent for revised section 1203.067 to be applied retroactively to probationers whose crimes occurred before its effective date. (See *Brown, supra*, 54 Cal.4th at pp. 319–320; *Alford, supra*, 42 Cal.4th at p. 754.) Moreover, to construe the statute as applying to those probationers would raise serious constitutional questions under the federal and state ex post facto clauses. Therefore, in keeping with the mandate of section 3, the amended statute must be viewed as ‘unambiguously prospective,’ applying to probationers who committed their crimes on or after the statute’s effective date of September 9, 2010. (See *Brown*, at p. 320.)”

We agree with the analysis propounded by the *Douglas M.* court on this point and conclude the statutory language does not clearly indicate a legislative intent that section

1203.067 is to be applied retroactively to probationers whose crimes occurred before its effective date. In the present case, appellant committed his offenses before September 9, 2010. Consequently, the provisions of revised section 1203.067 were improperly applied to him and must be stricken. (See *Douglas M.*, *supra*, 220 Cal.App.4th at pp. 1076-1077.)⁵

III. DISPOSITION

The judgment is modified to strike the new terms and conditions of probation imposed on appellant pursuant to amended section 1203.067. As so modified, the judgment is affirmed. The writ of supersedeas is hereby dissolved with immediate effect.

REARDON, J.

We concur:

RUVOLO, P. J.

HUMES, J.

⁵ In light of our conclusion that amended section 1203.067 is inapplicable to probationers like appellant who committed their offenses before the effective date of the revised statute, we need not resolve the jurisdictional and constitutional arguments also raised on appeal.~(See AOB 17, 23-26)~