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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHACH HERNANDEZ,

Defendant and Appellant.

A146067

(Alameda County
Super. Ct. No. H49181)

In 2010, Chach Hernandez entered a plea of no contest to a felony charge of possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)). Imposition of sentence was suspended, and Hernandez was placed on probation for a period of five years. In 2015, Hernandez responded to a petition seeking to revoke his probation by asking the court to reduce his conviction to a misdemeanor pursuant to *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). He contended that the resentencing provisions of Proposition 47, as embodied in Penal Code section 1170.18,¹ were inapplicable since he had not been “sentenced” within the meaning of that statute. He submitted an alternative petition for resentencing under Proposition 47. The court declined to apply *Estrada* but granted the Proposition 47 petition, reducing Hernandez’s sentence and terminating probation. Hernandez contends he was entitled to sentence reduction under *Estrada* and should therefore no longer be subject to the firearms possession disqualification applicable to an ex-felon. We disagree and affirm.

¹ Undesignated statutory references are to the Penal Code.

I. BACKGROUND

On July 23, 2010, Hernandez was charged by complaint with possessing for sale cocaine base (Health & Saf. Code, § 11351.5). On July 26, 2010, he entered a plea of no contest to a lesser charge of felony possession of cocaine base (*id.*, § 11350, subd. (a)). Imposition of sentence was suspended and Hernandez was placed on five years' probation. On August 3, 2015, he was arrested for domestic violence offenses, and a petition was filed to revoke his probation. At a hearing on August 11, 2015, Hernandez moved for reduction of his underlying conviction to a misdemeanor pursuant to Proposition 47's amendment to Health and Safety Code section 11350. Hernandez argued that the trial court should resentence him pursuant to the rule articulated by *Estrada, supra*, 63 Cal.2d 740, retroactively applying the mitigated punishment of the amended statute to his conduct. Hernandez contended section 1170.18 did not apply to him since, as a probationer, he had not been sentenced within the meaning of that statute; however, he concurrently filed a Proposition 47 petition for resentencing pursuant to section 1170.18.

The trial court denied Hernandez's *Estrada* motion but granted the Proposition 47 petition. Hernandez's probation was revoked and terminated. Hernandez filed a timely notice of appeal.

II. DISCUSSION

A. Proposition 47

In 2014, California voters passed the Safe Neighborhoods and Schools Act (Proposition 47), which was intended to “ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and drug treatment.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.) To that end, Proposition 47 reduced most possessory drug offenses and thefts of property valued at less than \$950 to straight misdemeanors and created a process for persons currently serving felony sentences for those offenses to petition for resentencing (§ 1170.18).

Proposition 47 created a procedure for persons currently serving felony sentences to petition for recall of their sentences and resentencing if their crimes would have been misdemeanors under the statutes amended or added by the initiative. Under section 1170.18, “(a) A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [it] been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by [Proposition 47]. [¶] (b) . . . If the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.”

A conviction recalled under section 1170.18 is to be considered a misdemeanor “for all purposes,” except that “such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction [for being a felon in possession of a firearm].” (§ 1170.18, subd. (k).)

B. *Estrada*

In *Estrada*, our Supreme Court addressed the application of a statutory amendment reducing minimum punishment for an act committed before the amendment, but for which a defendant was sentenced after the amendment. (*Estrada, supra*, 63 Cal.2d at p. 742.) The court held that, notwithstanding section 3 of the Penal Code,² “[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that

² Section 3 provides that no part of the Penal Code is retroactive “unless expressly so declared.”

the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.” (*Id.* at p. 745.) As to section 3, the high court explained “[t]hat section simply embodies the general rule of construction, coming to us from the common law, that when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively.” (*Id.* at p. 746.)

“*Estrada*, which creates a presumption of retroactivity in apparent contradiction to the default rule [of section 3], has been confined by subsequent decisions to its ‘ “specific context.” ’ ” (*People v. Davis* (2016) 246 Cal.App.4th 127, 135 (*Davis*), citing *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1196, disapproved on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) “Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent.” (*People v. Brown* (2012) 54 Cal.4th 314, 319.) The rule of *Estrada* “is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent.” (*People v. Nasalga* (1996) 12 Cal.4th 784, 793, fn. omitted.)

In *Davis*, our colleagues in Division One recently considered and rejected the identical argument Hernandez makes here. We agree with their analysis. “In the case of Proposition 47, the electorate spoke with exceptional precision about the intended retroactive application of the changes to California criminal law at issue here. Persons ‘currently serving a sentence’ for a conviction of a crime reduced from a felony to a misdemeanor by Proposition 47 are entitled to the benefit of the statutory changes, but only to the extent and under the conditions specified by section 1170.18, which governs the retroactive application of these changes. (§ 1170.18, subd. (a).)” (*Davis, supra*, 246 Cal.App.4th at pp. 136–137.)

The *Davis* court relied in part on *People v. Yearwood* (2013) 213 Cal.App.4th 161, 170, which applied parallel provisions in Proposition 36 (the Three Strikes Reform Act of 2012). The defendant in *Yearwood* argued he was entitled to a Proposition 36 reduction of his “Three Strikes” life sentence under the doctrine of *Estrada*, without having to follow the procedures of section 1170.126. (*Yearwood*, at pp. 168, 172.) The resentencing provisions of Proposition 36, contained in section 1170.126, provided “the functional equivalent of a saving clause” and demonstrated voter intent that “a petition for recall of sentence [under section 1170.126 was] to be the sole remedy available under the Act” for defendants seeking the retroactive application of its amendments. (*Yearwood*, at p. 172.) The *Davis* court noted that “[f]or these purposes, section 1170.18 is identical to the sentence modification provisions of Proposition 36, enacted two years earlier Just as section 1170.126 acted as the functional equivalent of a saving clause for Proposition 36 by specifying the precise manner in which the statutory changes effected by the proposition would be applied to persons sentenced under prior law, section 1170.18 plays the same role for Proposition 47. [¶] Accordingly, in the case of persons who were either ‘currently serving a sentence’ or had completed a sentence for a felony reduced to a misdemeanor by Proposition 47, the electorate made clear its intent as to the nature and extent of the retroactive application of the amendments. For those persons, there is no need, and no place, for inferences about retroactive application, and therefore no basis for invoking *Estrada*.” (*Davis, supra*, 246 Cal.App.4th at p. 137; see *People v. Cornett* (2012) 53 Cal.4th 1261, 1269, fn. 6 [“identical language appearing in separate statutory provisions should receive the same interpretation when the statutes cover the same or analogous subject matter”].)

C. *Hernandez was “Currently Serving a Sentence”*

Central to Hernandez’s argument is his contention that he did not fall under Proposition 47’s resentencing provisions because, as a probationer, he was not “currently serving a sentence” for a felony conviction at the time Proposition 47 was enacted. He points to the statutory definition of “ ‘probation’ ” as “the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the

community under the supervision of a probation officer” (§ 1203, subd. (a)), and insists that by definition “a probationer cannot serve a sentence pursuant to a judgment of conviction.” We are not persuaded.

The principles for interpreting a proposition enacted by popular vote are the same as those for interpreting a statute enacted by our Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796.) We start with the text, and if its plain meaning is unambiguous, we end there as well. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.) If the meaning is ambiguous, we may also consider the initiative’s purpose and intent. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571; *Zamudio*, at pp. 192–193.) “ ‘ “When the language [of an initiative measure] is ambiguous, ‘we refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.” ’ [Citation.] ‘In other words, our “task is simply to interpret and apply the initiative’s language so as to effectuate the electorate’s intent.” ’ ” (*People v. Arroyo* (2016) 62 Cal.4th 589, 593.)³ “ [W]e “must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.” ’ ” (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1063, disapproved on other grounds in *People v. Harrison* (2013) 57 Cal.4th 1211, 1230, fn. 2.) Proposition 47 directs that its provisions “shall be liberally construed to effectuate its purposes.” (Voter Information Guide, *supra*, text of Prop. 47, § 18, p. 74.)

We first agree with the *Davis* court’s conclusion that section 1170.18 is ambiguous in its use of the term “serving a sentence.” (*Davis, supra*, 246 Cal.App.4th at p. 139.) In other contexts, our Supreme Court has found that “[t]he Legislature has treated the concepts of sentence and probation differently.” (*People v. Rosbury* (1997)

³ We grant Hernandez’s request that we take judicial notice of Proposition 47 ballot pamphlet materials. (See *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 22, fn. 10 [ballot pamphlet, as an official government document, is a proper subject of judicial notice].)

15 Cal.4th 206, 210 [rejecting claim that the defendant was “already serving” another sentence for purposes of § 667, subd. (c)(7) when subject to an unexpired term of probation].) “No matter whether sentence was originally imposed or suspended, it does not begin to be served following probation revocation until the offender is ‘delivered over to the proper officer’ (§ 1203.2, subd. (c); [citation]).” (*Rosbury*, at p. 211.)

“On the other hand . . . , the term ‘sentence’ can also be understood to refer more generally to criminal sanction, whether by probation, prison term, or otherwise, and the relevant phrase from section 1170.18 can be interpreted to mean, in effect, ‘currently subject to judicially imposed sanction’ as a result of a felony conviction. This is likely the plain meaning of the term ‘sentence,’ which Merriam-Webster defines as ‘one formally pronounced by a court or judge in a criminal proceeding and specifying the punishment to be inflicted upon the convict’ and ‘the punishment so imposed.’ [Citation.] Nor is usage in this manner unheard of within the law. The same statutory provision declaring probation to occur when sentence is suspended also defines the term ‘conditional sentence’ to mean unsupervised community release. (§ 1203, subd. (a).) Further, California Rules of Court, rule 4.405(6) defines ‘“Sentence choice” ’ as ‘the selection of any disposition of the case that does not amount to a dismissal, acquittal, or grant of a new trial,’ thereby including probation as a sentence choice. (See Cal. Rules of Court, rule 4.406(b)(1) [‘[g]ranted probation’ is a [s]entence choic[e]’ requiring a statement of reasons]; *People v. Villanueva* (1991) 230 Cal.App.3d 1157, 1161 [same].) Judicial decisions have also used the term ‘sentence’ in this manner. It is therefore clear that the term ‘sentence’ can be, and is, used to refer both to a term of confinement specifically and to criminal punishment generally. Although the latter use is more colloquial than defendant’s suggested interpretation, it is by no means unreasonable.” (*Davis, supra*, 246 Cal.App.4th at pp. 139–140, fns. omitted; see *People v. Mendoza* (2003) 106 Cal.App.4th 1030, 1034 [noting that another voter initiative used the language “ ‘sentenced to probation’ ”].)

Finding the legislative history inconclusive, *Davis* looked to “the other extrinsic aids—“ ‘the ostensible objects to be achieved, the evils to be remedied, . . . public

policy, . . . and the statutory scheme of which the statute is a part ’ ’ ’ (Lopez [v. Superior Court], *supra*, 50 Cal.4th at p. 1063)—to resolve the issue.” (Davis, *supra*, 246 Cal.App.4th at pp. 141–142.) We agree that “[r]esolution of the issue on this basis is straightforward.” (*Id.* at p. 142.) “The definition of ‘currently serving a sentence’ that best fits the purposes of Proposition 47 and the public policy underlying it is clearly the more inclusive one. The provision in question was intended to apply the changes effected by the proposition to persons who had already suffered felony convictions for crimes now declared to be misdemeanors. The Supreme Court in *Estrada* found it ‘obvious’ the Legislature intended statutes mitigating punishment to be applied retroactively to the maximum permissible extent, since to infer otherwise ‘would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.’ (*Estrada, supra*, 63 Cal.2d at p. 745.) For much the same reason, we infer the electorate was similarly motivated in authorizing the recall of felony sentences under section 1170.18. Consistent with this inference of lenity, we presume the electorate intended to make all persons who were subject to judicial sanction under a felony conviction eligible for recall of sentence under subdivision (a) of section 1170.18, rather than only those persons actually confined. This broader reading is, without serious question, ‘ “ ‘the construction that comports most closely with the apparent intent of the [electorate], with a view to promoting rather than defeating the general purpose of the statute.’ ” ’ ” (Davis, at p. 142, fn. omitted.)

To interpret the statutory language otherwise would lead to absurd consequences. “Proposition 47 was intended to reach those with ‘nonserious, nonviolent crimes like . . . drug possession,’ which would encompass many who were granted probation. (Voter Information Guide, *supra*, text of Prop. 47, § 3, p. 70.) To deprive those defendants of the benefit of the reduced penalty for their offenses would create an incongruity the voters would not have either anticipated or approved.” (*People v. Garcia* (2016) 245 Cal.App.4th 555, 559.) “Because probationers are more likely to be nonviolent offenders and have a limited criminal history, they are ostensibly more ‘worthy’ of reduction in their crimes and sentences than persons sentenced to a prison term, at least as

a general matter. If the electorate was willing to extend the remedy of recall to felons sentenced to prison, they presumably would be even more willing to extend that remedy to probationers. We are unaware of any plausible explanation for making a distinction between probationers and persons sentenced to confinement in this respect.” (*Davis, supra*, 246 Cal.App.4th at p. 142.)

Several reported decisions have assumed, without discussion, that probationers are subject to resentencing under section 1170.18. (See *People v. Amaya* (2015) 242 Cal.App.4th 972, 974–975; *People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1308–1309; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 447; *People v. Shabazz* (2015) 237 Cal.App.4th 303, 310, [discussing Proposition 47 mechanism for resentencing after being “sentenced (or placed on probation)”].) We join those courts specifically addressing this issue that have agreed an order granting probation and suspending imposition of sentence is a form of “sentencing” for purposes of Proposition 47. (*Davis, supra*, 246 Cal.App.4th at p. 143; *People v. Tidwell* (2016) 246 Cal.App.4th 212, 218–219; *People v. Garcia, supra*, 245 Cal.App.4th at pp. 558–559.)

III. DISPOSITION

The order denying Hernandez’s motion for resentencing pursuant to *Estrada* is affirmed.

BRUINIERS, J.

WE CONCUR:

JONES, P. J.

NEEDHAM, J.