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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHELLE KAY CERVANTES, Defendant and Appellant.	B232539 (Los Angeles County Super. Ct. No. KA093478)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel S. Lopez, Judge. Dismissed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Robert M. Snider, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Michelle Cervantes pleaded no contest to felony possession of a controlled substance (methamphetamine). (Health & Saf. Code, § 11377, subd. (a).) Defendant requested that the trial court place her on probation pursuant to the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36). (Pen. Code,[1] § 1210.1). Finding that defendant had received two prior grants of probation under Proposition 36, the trial court concluded that defendant was ineligible for Proposition 36 probation and, instead, placed defendant on formal probation for three years. (§ 1203.) In her opening brief on appeal, defendant contended that the trial court erred in failing to place her on probation under Proposition 36. We requested that the parties submit letter briefs on the issue of whether the appeal is moot because defendant, while on probation in this case, committed another offense for which she was sentenced to a term of one year four months in prison.[2] For the reasons set forth below, we conclude that defendant's appeal is moot and, accordingly, dismiss the appeal.

BACKGROUND[3]

On July 15, 2003, defendant was placed on probation for three years under Proposition 36 for a violation of Health and Safety Code section 11377, subdivision (a)

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[1] All statutory citations are to the Penal Code unless otherwise noted.

[2] We take judicial notice of the Superior Court's file in this case. The Superior Court file reflects that on June 1, 2011, in Case No. KA094242, defendant was convicted by plea of a violation of section 12316, subdivision (b)(1) and sentenced to prison for a term of one year four months. At the same time, defendant admitted that she was in violation of her probation in this case by failing to obey all laws. The trial court sentenced defendant to a concurrent prison term of one year four months for her probation violation.

[3] Because defendant was convicted pursuant to a plea agreement and there was no preliminary hearing, we rely on defendant's probation report for the facts underlying defendant's offense.

(possession of a controlled substance). On January 10, 2011, defendant, for a second time, was placed on probation for one year under Proposition 36 for a violation of Health and Safety Code section 11377, subdivision (a).

On February 24, 2011, Los Angeles County Sheriff's Department deputies detained defendant in the driveway of her home because they knew that she was on probation. As the deputies placed defendant in handcuffs, they noticed that she kept trying to reach for her pocket. The deputies asked defendant if she had anything illegal on her person. Defendant responded, "I don't know." The deputies searched defendant's pocket and recovered a plastic bindle that contained a crystallized substance that resembled methamphetamine. The deputies also recovered a methamphetamine pipe with a burnt glass bulb on one end and white residue throughout. The deputies arrested defendant for possession of a controlled substance and possession of a smoking device.

On March 9, 2011, defendant pleaded no contest to felony possession of a controlled substance. (Health & Saf. Code, § 11377, subd. (a).) In connection with her plea, defendant requested that she be placed on probation under Proposition 36 concurrent to her then pending Proposition 36 probation. The trial court denied the request, finding defendant ineligible for Proposition 36 probation because she had two prior grants of Proposition 36 probation. The trial court placed defendant on formal probation for three years.

On June 1, 2011, defendant was convicted by plea of a violation of section 12316, subdivision (b)(1) in Case No. KA094242 and sentenced to prison for a term of one year four months. At the same time, defendant admitted that she violated her probation in this case by failing to obey all laws and was sentenced to a concurrent prison term of one year four months for her probation violation.

DISCUSSION

In her opening brief on appeal, defendant contended that the trial court erred when it denied her probation under Proposition 36 on the ground that she had been placed on Proposition 36 probation on two prior occasions without also finding that she had

participated in two separate courses of drug treatment and was unamenable to any and all forms of available drug treatment. After respondent filed its brief, we requested that the parties submit letter briefs on the issue of whether the appeal is moot because defendant, while on probation in this case, committed the offense in Case No. KA094242 for which she was sentenced to a term of one year four months in prison. The parties agree that defendant's appeal is moot.

"As a general rule, an appellate court only decides actual controversies. It is not the function of the appellate court to render opinions '"'"upon moot questions or abstract propositions, or . . . declare principles or rules of law which cannot affect the matter in issue in the case before it."'"' [Citation.] '[A] case becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief. [Citation.]' [Citation.]" (*People v. Rish* (2008) 163 Cal.App.4th 1370, 1380.) Thus, "'[a]n action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal in such a case would be without practical effect, and the appeal will therefore be dismissed.' [Citation.]" (*In re Dani R.* (2001) 89 Cal.App.4th 402, 404; *People v. DeLong* (2002) 101 Cal.App.4th 482, 486.)

Proposition 36 probation is mandatory for qualifying defendants. Section 1210.1, subdivision (a) provides, in relevant part, "Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program." Section 1210, subdivision (b) provides, in relevant part, "The term 'drug treatment program' or 'drug treatment' does not include drug treatment programs offered in a prison or jail facility." (*People v. Wandick* (2004) 115 Cal.App.4th 131, 135; *People v. Esparza* (2003) 107 Cal.App.4th 691, 698-699.)

In *People v. Esparza, supra,* 107 Cal.App.4th 691, Esparza was convicted of a nonviolent drug offense while on probation for felony vandalism. (*Id.* at p. 694.) The trial court revoked Esparza's probation and sentenced him to prison on both offenses.

(*Ibid.*) On appeal, Esparza contended that the trial court should not have sentenced him to prison because he had been convicted of a nonviolent drug offense and was eligible for Proposition 36 probation. (*Id.* at p. 695.) Esparza argued that none of exceptions to eligibility in section 1210.1, subdivision (b)[4] applied to him. (*People v. Esparza, supra,* 107 Cal.App.4th at p. 695.) The court of appeal rejected Esparza's argument, holding that Esparza could not participate in a Proposition 36 drug treatment program while incarcerated because, under section 1210, subdivision (b), such programs were not available in prison. (*People v. Esparza, supra,* 107 Cal.App.4th at pp. 698-699.) The court reasoned that because Esparza had been "sent to prison with no access to drug

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[4] Section 1210.1, subdivision (b) provides:

"Subdivision (a) shall not apply to any of the following:

"(1) Any defendant who previously has been convicted of one or more violent or serious felonies as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, respectively, unless the nonviolent drug possession offense occurred after a period of five years in which the defendant remained free of both prison custody and the commission of an offense that results in a felony conviction other than a nonviolent drug possession offense, or a misdemeanor conviction involving physical injury or the threat of physical injury to another person.

"(2) Any defendant who, in addition to one or more nonviolent drug possession offenses, has been convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony.

"(3) Any defendant who, while armed with a deadly weapon, with the intent to use the same as a deadly weapon, unlawfully possesses or is under the influence of any controlled substance identified in Section 11054, 11055, 11056, 11057, or 11058 of the Health and Safety Code.

"(4) Any defendant who refuses drug treatment as a condition of probation.

"(5) Any defendant who has two separate convictions for nonviolent drug possession offenses, has participated in two separate courses of drug treatment pursuant to subdivision (a), and is found by the court, by clear and convincing evidence, to be unamenable to any and all forms of available drug treatment, as defined in subdivision (b) of Section 1210. Notwithstanding any other provision of law, the trial court shall sentence that defendant to 30 days in jail."

programs administering Proposition 36 drug treatment, the trial court was not required to engage in the superfluous act of placing a defendant on probation when he could not participate in the treatment program required as a condition of that probation. We do not construe statutes to create absurd results." (*Id.* at p. 698.)

Here, after the trial court denied defendant's request for Proposition 36 probation, defendant was convicted of an offense in Case No. KA094242 for which she was sentenced to prison. Because defendant was sentenced to prison and Proposition 36 drug treatment programs are not offered in prison, defendant cannot participate in a Proposition 36 drug treatment program in this case. (*People v. Esparza, supra,* 107 Cal.App.4th at pp. 698-699.) As defendant, by events subsequent to her conviction in this case, cannot participate in a Proposition 36 drug treatment program, there is no relief we can grant defendant and the appeal is moot. (*People v. Rish, supra,* 163 Cal.App.4th at p. 1380; *In re Dani R., supra,* 89 Cal.App.4th at p. 404; *People v. DeLong, supra,* 101 Cal.App.4th at p. 486.) Accordingly, the appeal should be dismissed.

DISPOSITION

The appeal is dismissed as moot.

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MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.