Filed 5/18/16 P. v. Garcia CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,
 	
    Plaintiff and Respondent,
 	
v.
 	
ABEL ANTHONY GARCIA, JR.,
 	
    Defendant and Appellant.
	2d Crim. No. B266439
	(Super. Ct. No. 2014024931)
	(Ventura County)

Abel Anthony Garcia, Jr., appeals from an order recalling his felony sentence, resentencing it to a misdemeanor, and placing him on misdemeanor parole for one year. The order was entered pursuant to Penal Code section 1170.18, enacted by Proposition 47.[1] Appellant contends that he is entitled to have the one-year period of misdemeanor parole reduced by his excess custody credits, i.e., the number of days by which his time served in prison exceeds his misdemeanor sentence. We affirm.

Procedural Background

Our recitation of the procedural background is based in part on the "*Procedural Background*" section of our prior unpublished opinion in the instant case, *People v. Garcia, Jr.* (July 16, 2015, B260932 [2015 WL 4372681, nonpub. opn.].) Pursuant to Evidence Code sections 459 and 452, subdivision (d), we take judicial notice

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[1] All statutory references are to the Penal Code unless otherwise stated.

of the prior unpublished opinion. (See *Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 61 [court took judicial notice of background facts from prior unpublished opinion in same case].)

A two-count felony complaint charged appellant with second-degree burglary (§§ 459, 460) and misdemeanor petty theft. (§§ 484, subd. (a), 488.) Appellant pleaded guilty to second-degree burglary. He admitted one prior strike conviction for residential burglary within the meaning of California's "Three Strikes" law. (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).) In October 2014 the trial court sentenced him to the low term of 16 months, doubled to 32 months because of the strike. The court dismissed the misdemeanor petty theft charge.

At the general election on November 4, 2014, the voters approved Proposition 47, which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) Proposition 47 added section 459.5 to the Penal Code. The section creates the offense of "shoplifting," which is defined as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours where the value of the property that is taken or intended to be taken does not exceed" $950. (*Id.,* subd. (a).) Except for special situations not applicable here, shoplifting is a misdemeanor. (*Ibid.*)

Proposition 47 also added section 1170.18 to the Penal Code. The section provides that a person who is "currently serving a sentence for a conviction . . . of a felony . . . 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 . . . to request resentencing" under the misdemeanor statute. (*Id.*, subd. (a).) If the petitioner satisfies certain criteria, "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." (*Id.*, subd. (b).)

On November 24, 2014, appellant filed a petition for recall of his sentence and for resentencing to a misdemeanor under section 459.5. The trial court denied the

petition. Appellant appealed. We reversed and "remanded [the matter] to the trial court with directions to grant the petition and resentence appellant to a misdemeanor under section 459.5 unless it 'determines that resentencing [him] would pose an unreasonable risk of danger to public safety.' [Citation.]" (*People v. Garcia, Jr.*, *supra*, slip opinion at p. 5 [2015 WL 4372681 at p. 3.].)

On remand, the trial court resentenced appellant to a misdemeanor. It ordered him to serve 180 days in county jail and gave him credit for time served of 180 days. Pursuant to section 1170.18, subdivision (d), the court placed appellant on misdemeanor parole for one year and denied his request to reduce the one-year parole period by his excess custody credits.

Discussion

Appellant contends that, against the one-year period of misdemeanor parole, he is entitled to credit for the number of days by which his time served in prison exceeds his misdemeanor sentence.[2] Such credits are referred to as "*Sosa* credits." In *In re Sosa* (1980) 102 Cal.App.3d 1002, the court held that presentence custody credits in excess of a prisoner's term of imprisonment reduce the prisoner's time on parole.

"[O]ur 'task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent.' [Citation.]" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) "'[W]e apply the same principles that govern statutory construction. [Citation.] Thus, "we turn first to the language of the statute, giving the words their ordinary meaning." [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the

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[2] This issue is before the California Supreme Court in *People v. Morales*, no. S228030, review granted Aug. 26, 2015. (See Supreme Ct. News Release dated Oct. 16, 2015, p. 2, http://www.courts.ca.gov/documents/ws101215.pdf [*Morales* "presents the following issue: Can excess custody credits be used to reduce or eliminate the one-year parole period required by Penal Code section 1170.18, subdivision (d), upon resentencing under Proposition 47?]".)

electorate's intent]. When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.]" (*Id.*, at pp. 900-901.)

The language of section 1170.18, subdivision (d) is unambiguous. It provides, "A person who is resentenced . . . shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion . . . releases the person from parole." The phrase "shall be given credit for time served and shall be subject to parole for one year" indicates that, irrespective of the amount of credit for time served on the felony offense before it was reduced to a misdemeanor, the petitioner shall be subject to parole for one year. Otherwise, the phrase would read, "shall be given credit for time served and shall be subject to parole for one year *unless credit for time served reduces the one-year parole period.*" Instead, the "unless" clause states, "unless the court, in its discretion . . . releases the person from parole."

The statutory language makes clear that the only exception to the one-year parole requirement is if the court releases the person from that requirement. "'[T]he existence of specific exceptions does not imply that others exist. The proper rule of statutory construction is that the statement of limited exceptions excludes others, and therefore the judiciary has no power to add additional exceptions; the enumeration of specific exceptions precludes implying others.' [Citation.]" (*In re James H.* (2007) 154 Cal.App.4th 1078, 1083-1084; see also *Building Profit Corp. v. Mortgage & Realty Trust* (1995) 36 Cal.App.4th 683, 689 ["'When a statute contains an exception to a general rule laid down therein, that exception is strictly construed [citation] [and] [o]ther exceptions are necessarily excluded'"].)

If the language of section 1170.18, subdivision (d) were ambiguous, the ambiguity would be cured by the Legislative Analyst's comments in the official ballot pamphlet. The Legislative Analyst informed the voters: "Offenders who are resentenced would be required to be on state parole for one year, unless the judge chooses to remove that requirement." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), Prop. 47,

Analysis by Legislative Analyst, p. 36.) Any voter who read this statement would have assumed that a one-year period of parole is mandatory unless the judge reduces or eliminates it.

"The Legislative Analyst's comments, like other materials presented to the voters, 'may be helpful but are not conclusive in determining the probable meaning of initiative language.' [Citation.] Thus, when other statements in the election materials contradict the Legislative Analyst's comments we do not automatically assume that the latter accurately reflects the voters' understanding. [Citation.]" (*San Francisco Taxpayers Assn. v. Bd. of Supervisors* (1992) 2 Cal.4th 571, 580.) Nothing in the election materials for Proposition 47 contradicts the Legislative Analyst's conclusion that a person resentenced to a misdemeanor "would be required to be on state parole for one year." This is the only statement in the election materials concerning the one-year misdemeanor parole period. (See *People v. Superior Court (Henkel)* (2002) 98 Cal.App.4th 78, 82 [Legislative Analyst's comment "eliminates doubt" as to correct interpretation of ballot proposition].)

Disposition

The order recalling appellant's felony sentence, resentencing him to a misdemeanor, and placing him on misdemeanor parole for one year is affirmed.

<u>NOT TO BE PUBLISHED.</u>

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Patricia Murphy, Judge

Superior Court County of Ventura

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       Jonathan B. Steiner, Executive Director, Richard Lennon, Staff Attorney, under appointment by the Court of Appeal, for Defendant and Appellant.

       Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.