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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD CAMACHO RODRIGUEZ,

Defendant and Appellant.

C079076

(Super. Ct. No. CRF 12-0692)

Defendant Richard Camacho Rodriguez appeals from the trial court's order granting his petition for resentencing pursuant to Penal Code section 1170.18.¹ He contends that the trial court violated his due process right to be personally present at resentencing and erred in failing to order a supplementary probation report. He also contends that one of his prior prison term enhancements should have been stricken, and

¹ Undesignated statutory references are to the Penal Code.

that counsel was inadequate for failing raise the issue at resentencing. Finding any error regarding defendant's presence to be harmless, a supplementary probation report was not authorized, and the trial court could not strike the prior prison term, we affirm the trial court's orders.

BACKGROUND

On May 1, 2011, defendant entered the storage room of a carport through a closed door and left after the resident saw him. He was later found riding a bicycle stolen from a nearby home.

A jury convicted defendant of burglary (§ 459) and receiving stolen property (§ 496) and sustained an enhancement for another person present during the burglary (§ 667.5, subd. (c)(21)). The trial court sustained two strike, two serious felony, and three prior prison term allegations. (§§ 667.5, subd. (b), 667, subds. (a)(1), (d) & (e), 1192.7.) Defendant was sentenced to 38 years to life, consisting of 25 years to life for burglary, two consecutive five-year terms for the serious felonies, three consecutive one-year terms for the prior prison terms, and a concurrent 25 years to life on the receiving stolen property count. We affirmed the conviction in an unpublished opinion in October 2014.

Defendant subsequently filed a pro per petition for resentencing on the receiving stolen property conviction. The petition requested the trial court redesignate the offense as a misdemeanor, appoint a public defender to represent him, order a supplementary probation report, have credit for time served applied to the receiving stolen property count, and any other remedy in the court's power.

Defendant was not present at the hearing on the motion, but counsel for defendant was present. The trial court reduced the receiving stolen property conviction to a misdemeanor and sentenced him to a concurrent 180-day jail term on that offense.

could not affect defendant's actual sentence. Defendant was also represented by counsel at the proceeding. A hearing at which the trial court substitutes a concurrent misdemeanor term for a concurrent felony term is not a critical stage at which defendant's presence is necessary.

Defendant's contention regarding the probation report is likewise without merit. A court is not required to order a probation report or supplementary probation report if the defendant is ineligible for probation. (*People v. Franco* (2014) 232 Cal.App.4th 831, 834.) Since defendant's three strikes term was unaffected by the resentencing hearing, he was ineligible for probation and therefore no supplemental report was required.

II

Defendant contends he was entitled to resentencing on one of his prior prison term enhancements because the felony underlying one of the enhancements, a 2000 conviction for possession of a controlled substance (Health & Saf. Code, § 11377), is now a misdemeanor under Proposition 47.² We disagree.

One of defendant's prior prison term enhancements was based on a 2000 Stanislaus County conviction for possession of a controlled substance. (Health & Saf. Code, § 11377.) As previously noted, possession of a controlled substance is a misdemeanor under the Act. (See Health & Saf. Code, § 11377.) Since the prior prison term enhancement requires that defendant be convicted of a felony and have served a prison term for that conviction (§ 667.5, subd. (b)), this raises the question of whether a prior prison term enhancement based on what would now be a misdemeanor conviction survives the Act.

Neither defendant nor his appointed counsel for the section 1170.18 proceedings moved to designate the possession prior as a misdemeanor. Since the prior was in

² This issue is before the Supreme Court. (See *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900.)

Stanislaus County, the trial court hearing defendant's petition, the Yolo County Superior Court, could not designate that prior as a misdemeanor; a separate petition to re-designate must be filed in Stanislaus County. (See § 1170.18, subd. (f) ["A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors"].) While this forfeits defendant's contention on appeal, we address the merits of the claim since defendant alleges counsel was ineffective for failing to have the appropriate court designate the prior as a misdemeanor and have the prior prison term enhancement stricken.

We begin by noting section 1170.18 does not apply retroactively. Subdivision (k) was interpreted in the context of felony jurisdiction over criminal appeals in *People v. Rivera* (2015) 233 Cal.App.4th 1085 (*Rivera*). *Rivera* found that subdivision (k), which parallels the language from section 17 regarding the reduction of wobblers to misdemeanors,³ should be interpreted in the same way as being prospective, from that point on, and not for retroactive purposes. (*Rivera, supra*, at p. 1100; see also *People v. Moomey* (2011) 194 Cal.App.4th 850, 857 [assisting a second degree burglary after the fact does not establish the necessary element of the commission of an underlying felony because the offense is a wobbler: "Even if the perpetrator was subsequently convicted and given a misdemeanor sentence, the misdemeanant status would not be given retroactive effect"].) The court in *Rivera* accordingly concluded the felony status of an

³ Section 17, subdivision (b) states in pertinent part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances"

offense charged as a felony did not change after the Act was passed, thereby conferring jurisdiction on the Court of Appeal.⁴ (*Rivera, supra*, at pp. 1094-1095, 1099-1101.) We see no reason to depart from *Rivera*. Although *Rivera* addressed subdivision (k) in a different context, its analysis of subdivision (k) is equally relevant here.

Defendant relies primarily on *People v. Park* (2013) 56 Cal.4th 782 (*Park*) and *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*). In *Park*, the Supreme Court held that a felony conviction properly reduced to a misdemeanor under section 17, subdivision (b), could not subsequently be used to support an enhancement under section 667, subdivision (a). (*Park, supra*, at p. 798.) Applying the reduction to eliminate an enhancement would be a retroactive application, which is impermissible under both section 17 and the Act. The distinction between retroactive and prospective application was recognized by the Supreme Court in *Park*. “There is no dispute that, under the rule in [prior California Supreme Court] cases, [the] defendant would be subject to the section 667[, subdivision] (a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor.” (*Park, supra*, at p. 802.) Retroactive versus prospective application was also invoked by the Supreme Court in distinguishing cases cited by the Attorney General. “None of the cases relied upon by the Attorney General involves the situation in which the trial court has affirmatively exercised its discretion under section 17[, subdivision] (b) to reduce a wobbler to a misdemeanor before the defendant committed and was adjudged guilty of a

⁴ *Rivera* also noted the absence of any evidence the voters wanted to go beyond directly reducing future and past punishment for convictions under the six included offenses. (*Rivera, supra*, at p. 1100 [“Nothing in the text of Proposition 47 or the ballot materials for Proposition 47—including the uncodified portions of the measure, the official title and summary, the analysis by the legislative analyst, or the arguments in favor or against Proposition 47—contains any indication that Proposition 47 or the language of section 1170.18, subdivision (k) was intended to change preexisting rules regarding appellate jurisdiction”].)

subsequent serious felony offense.” (*Park, supra*, at pp. 799-800.) In the case before us, defendant committed his current felonies before his prior convictions could be reduced to a misdemeanor; applying that reduction to eliminate the corresponding prior prison term enhancement would therefore be an impermissible retroactive application of the Act.

The defendant in *Flores* was sentenced to state prison following his conviction of selling heroin (Health & Saf. Code, § 11352), and his sentence for that crime was enhanced by one year under Penal Code section 667.5, subdivision (b). (*Flores, supra*, 92 Cal.App.3d at pp. 464, 470.) The enhancement was based on a prior felony conviction of possession of marijuana under Health and Safety Code section 11357. (*Flores, supra*, at p. 470.) That statute had since been amended in 1975 to make possession of marijuana a misdemeanor. (*Id.* at p. 471.)

The *Flores* court noted that in 1976 the Legislature enacted Health and Safety Code section 11361.5, subdivision (b), which “authorize[d] the superior court, on petition, to order the destruction of all records of arrests and convictions for possession of marijuana, held by any court or state or local agency and occurring prior to January 1, 1976.” (*Flores, supra*, 92 Cal.App.3d at p. 471.) Also in 1976, Health and Safety Code section 11361.7 “was added to provide in pertinent part that: ‘(a) Any record subject to destruction . . . pursuant to [Health and Safety Code s]ection 11361.5, or more than two years of age, or a record of a conviction for an offense specified in subdivision (a) or (b) of [Health and Safety Code s]ection 11361.5 which became final more than two years previously, shall not be considered to be accurate, relevant, timely, or complete for any purposes by any agency or person. . . . (b) No public agency shall alter, amend, assess, condition, deny, limit, postpone, qualify, revoke, surcharge, or suspend any certificate, franchise, incident, interest, license, opportunity, permit, privilege, right, or title of any person because of an arrest or conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 . . . on or after the date the records . . . are required to be destroyed . . . or two years from the date of such conviction . . . with respect to . . . convictions

occurring prior to January 1, 1976’ ” (*Flores, supra*, at pp. 471-472, italics omitted.) Based on these amendments, the court concluded “the Legislature intended to prohibit the use of the specified records for the purpose of imposing any collateral sanctions,” such as the prior prison term enhancement. (*Id.* at p. 472.)

Flores is inapposite because there is no similar declaration of legislative intent for full retroactivity either in the Act generally or section 1170.18 in particular. If the Act’s drafters wanted to invalidate prior prison term allegations because the underlying felony was now a misdemeanor, they could have included legislative language like that discussed in *Flores*. They did not.

When a defendant admits to the elements of the prior prison term enhancement, the subsequent reduction to a misdemeanor of the prior felony conviction underlying the enhancement does not prevent the trial court from imposing the prison prior at sentencing. Since defendant admitted having a prior felony conviction for possession of a controlled substance and having served a prior prison term for that conviction, the subsequent reduction of that offense to a misdemeanor did not prevent the trial court from imposing the enhancement at sentencing.

Defendant’s reliance on *In re Estrada* (1965) 63 Cal.2d 740 fares no better. *Estrada* held that if an amended statute mitigates punishment, the amendment will operate retroactively to impose the lighter punishment unless there is a saving clause. (*Id.* at p. 748.) The reason for this rule was that “ ’[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.’ ” (*Id.* at p. 745.) While the electorate intended to reduce penalties for crimes when it passed the Act, it did so only for those crimes the Act specifically covers. Retroactivity is limited to the procedures set forth in section 1170.18, which in turn applies to the offenses

specifically addressed by the Act, even if defendant's conviction was not final during the pendency of his petition⁵

Since defendant would not have succeeded in getting the prison prior stricken had the prior been reduced to a misdemeanor, counsel's failure to attack the enhancement in a section 1170.18 proceeding did not constitute ineffective assistance. (*People v. Memro* (1995) 11 Cal.4th 786, 834 [trial counsel need not raise futile objections to forestall ineffective assistance claims].)

DISPOSITION

The judgment (order) is affirmed.

NICHOLSON, Acting P. J.

We concur:

MURRAY, J.

RENNER, J.

⁵ Defendant's conviction became final on January 14, 2015, when the Supreme Court denied his petition for review. (*People v. Rodriguez* (review den. Jan. 14, 2015, S222634).) Defendant filed his petition on January 8, 2015. The trial court decided the merits of the petition on March 24, 2015.