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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

JOSE MIGUEL CUADRAS,

Defendant and Respondent.

E061367

(Super.Ct.No. CJR1400385 &
FVA1200567)

OPINION

APPEAL from the Superior Court of San Bernardino County. Charles M. Fuertsch, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Michael A. Ramos, District Attorney, and Eric M. Ferguson and Audrey Berthelsen, Deputy District Attorneys, for Plaintiff and Appellant.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Respondent.

The lower court ordered defendant Jose Miguel Cuadras discharged from postrelease community supervision (PRCS), on the ground that he had been on PRCS for over a year without suffering any “custodial sanction.” (Pen. Code, § 3456, subd. (a)(3).) The People argued that defendant had been subjected to flash incarceration twice and that flash incarceration constitutes a custodial sanction. The lower court rejected this argument, ruling that “the extension of the PRCS as a result of the flash incarceration is not . . . valid.”

The People appeal. We will hold that flash incarceration is a custodial sanction, and thus it does prevent PRCS from terminating early. Defendant argues (among other things) that flash incarceration itself violates due process, but we decline to address this contention because it was not raised below.

I

PROCEDURAL BACKGROUND

In May 2012, pursuant to a plea bargain, defendant pleaded no contest to one count of unlawful possession of a firearm by a felon or addict (Pen. Code, § 29800, subd. (a)) and was sentenced to 16 months in prison.

In January 2013, defendant was released from prison and placed on PRCS.

In April 2014, defendant’s parole officer filed a petition to revoke his PRCS. The petition, which was verified under penalty of perjury, alleged that in July 2013 and again in September 2013, defendant had been subjected to 10-day flash incarceration terms.

Most recently, he had violated PRCS conditions requiring him to report to his probation officer, to cooperate with his probation officer, and to submit to field interrogations.

Accordingly, in April 2014, a revocation hearing was held before a hearing officer.¹ At the hearing, defense counsel argued that the court lacked jurisdiction over defendant because his PRCS had already terminated “by operation of law.” She conceded that defendant had been subject to flash incarcerations, but argued, “I’d ask this Court to find that a flash [incarceration] . . . is not a valid extension of his PRCS as an intermediate sanction and should not extend supervision.” The People responded that flash incarceration did constitute a “custodial sanction” and therefore did extend defendant’s PRCS. (See Pen. Code, § 3456, subd. (a).)

The hearing officer ruled that “the extension of the PRCS as a result of the flash incarceration is not a valid extension as an intermediate sanction,” and therefore defendant’s PRCS had already terminated by operation of law. Thus, he ordered defendant released forthwith.

The People filed a timely notice of appeal.

¹ A hearing officer appointed by the court is statutorily authorized to adjudicate an alleged violation of the conditions of PRCS. (Pen. Code, § 3455, subd. (a); Gov. Code, § 71622.5, subd. (b).)

In this case, the record indicates that defendant stipulated to the hearing officer. (See Cal. Const., art. VI, § 21.) Certainly he did not object. (See *In re Horton* (1991) 54 Cal.3d 82, 91.) In any event, he does not claim the hearing officer lacked jurisdiction in any way.

II

APPEALABILITY

Preliminarily, defendant contends that the challenged order is not appealable.

Under Penal Code section 1238, subdivision (a)(5), the People may appeal from “[a]n order made after judgment, affecting the substantial rights of the [P]eople.” Certainly the order here was made after judgment. Defendant appears to argue, however, that it does not affect the substantial rights of the People, because it was not erroneous. This “confuses the contested issues on the merits with the procedural question of appealability.” (*People v. Totari* (2002) 28 Cal.4th 876, 884.) It would result in “judicial inefficiency” (*ibid.*) by forcing us to “determine whether this [appellant] is likely to prevail in order to determine whether [it] can appeal.” (*Id.* at p. 885.)

The People have a legitimate interest in having defendant serve out his full, lawfully mandated term of PRCS, whatever that may be. The order appealed from affects their substantial rights in that sense. It follows that it is appealable.²

III

FLASH INCARCERATION IS A “CUSTODIAL SANCTION”

The People contend that flash incarceration is a “custodial sanction” and thus prevents PRCS from expiring.

² Our holding does not determine one way or another whether a petition for extraordinary writ might also be appropriate in some cases. (Cf. *People v. Martinez* (1979) 88 Cal.App.3d 890, 894 [“[W]hile the instant order is appealable, mandamus is the preferable and more expeditious procedure.”].)

In 2011, the Legislature enacted what it called “the 2011 Realignment Legislation addressing public safety.” (Stats. 2011, ch. 15 [Realignment]; see *id.*, § 1). Under Realignment, when persons convicted of relatively low-level felonies are released from prison, they are placed on PRCS rather than on parole. (Pen. Code, § 3451, subd. (a), (b).) PRCS is similar but not identical to parole (see *People v. Jones* (2014) 231 Cal.App.4th 1257, 1266-1267 & fn. 8); for example, PRCS is supervised by the county, whereas parole is supervised by the state. (See *People v. Cruz* (2012) 207 Cal.App.4th 664, 672.)

Much like a parolee, a person on PRCS is subject to various restrictive conditions. (Pen. Code, §§ 3453, 3454, subd. (b).) If he or she violates these conditions, the supervising agency can respond with certain “intermediate sanctions”; these include “flash incarceration” (Pen. Code, §§ 3450, subd. (b)(8), 3454, subd. (b)) — a period of up to ten days in jail. (Pen. Code, § 3454, subd. (c).) A person placed on PRCS is statutorily required to “waive any right to a court hearing prior to the imposition of a period of ‘flash incarceration’” (Pen. Code, § 3453, subd. (q).) If the supervising agency determines that intermediate sanctions are not appropriate, it can petition a court to revoke PRCS. (Pen. Code, § 3455, subd. (a).)

Under most circumstances, PRCS can last for a maximum of three years. (Pen. Code, § 3456, subd. (a)(1).) However, the supervising agency has *discretion* to discharge “[a]ny person on postrelease supervision for six consecutive months with no violations of his or her conditions of postrelease supervision that result in a custodial sanction”

(Pen. Code, § 3456, subd. (a)(2).) Also, the supervising agency *must* discharge any “person who has been on postrelease supervision continuously for one year with no violations of his or her conditions of postrelease supervision that result in a custodial sanction” (Pen. Code, § 3456, subd. (a)(3).)

In this case, defendant had been subjected to flash incarceration less than twelve months before the hearing. Thus, if flash incarceration is a custodial sanction within the meaning of Penal Code section 3456, the hearing officer erred by ruling that his PRCS had terminated.

Recently, in *People v. Superior Court (Ward)* (2014) 232 Cal.App.4th 345 [Fourth Dist., Div. Two], petn. for rev. filed January 20, 2015,³ this court held that flash incarceration *is* a custodial sanction. As we stated, in flash incarceration, “[a]n offender is placed in custody as a sanction for violating the terms of his or her release. Ergo, it is a ‘custodial sanction.’” (*Id.* at p. 349.) We also noted that Penal Code section 3450, subdivision (b)(8)) lists flash incarceration as one of several available “sanctions.” (*Ward, supra*, at p. 351.)

³ Defendant has filed a request for judicial notice of the “record, “briefing,” and “opinion” in *Ward*.

Judicial notice of our published opinion in *Ward* is mandatory, even in the absence of a request. (Evid. Code, § 451, subd. (a).) By contrast, judicial notice of the record and briefs in *Ward* is permissible but not mandatory. (Evid. Code, § 452, subd. (d).) The parties have not cited any particular part of the record or the briefs, and the relevance of those documents is not apparent. Accordingly, judicial notice of the record and the briefs is denied without prejudice. (See *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422-423, fn. 2.)

Defendant argues that allowing flash incarceration to extend PRCS violates due process, because it gives the supervising agency “unbridled authority” to “extend supervision without having to avail itself of the judicial process.” In *Ward*, however, we rejected an identical argument. We explained that flash incarceration does not actually extend PRCS; rather, it prevents it from terminating early. (*People v. Superior Court (Ward)*, *supra*, 232 Cal.App.4th at p. 352.) We added that this procedure is consistent with the limitations that may be placed on the constitutional rights of parolees and other offenders who are subject to conditional release. (*Ibid.*)

In a twist on this argument, defendant also argues that flash incarceration itself violates due process. In *Ward*, as we noted, the defendant was not raising this particular argument, and therefore we did not address it. (*People v. Superior Court (Ward)*, *supra*, 232 Cal.App.4th at p. 352, fn. 11.)

We decline to address the argument in this case, too, because defendant forfeited it by failing to raise it below. (*People v. Abilez* (2007) 41 Cal.4th 472, 521, fn. 12.) We recognize that, under an exception to the forfeiture rule, we have discretion to consider “‘a pure question of law which is presented by undisputed facts.’ [Citation.]” (*People v. Hines* (1997) 15 Cal.4th 997, 1061.) Here, however, the relevant facts are not beyond dispute. At least at one time, San Bernardino County had a practice of asking supervisees to sign an express waiver of their constitutional objections to flash incarceration. (*People*

v. Superior Court (Ward), *supra*, 232 Cal.App.4th at pp. 348-349, 352-353.)⁴ We have no way of knowing whether defendant signed such a waiver; if he did, it would not necessarily be in the record. We also note that, the second time defendant was subject to flash incarceration, he stood accused of a new drug charge which was also a probation violation. The record does state, “The defendant’s probation violation was converted to a 10 day FLASH” Thus, defendant may have expressly or impliedly waived his constitutional objections to flash incarceration in consideration of being relieved of his probation violation.

Finally, defendant argues that, even if the trial court erred, he should not be placed back on PRCS because that “would create a substantial and undue hardship.” Yet again, we rejected an identical argument in *Ward*. (*People v. Superior Court (Ward)*, *supra*, 232 Cal.App.4th at p. 353, fn. 13.) We concluded that the defendant still presented a “real risk to the public.” (*Ibid.*) The same is true here.

We therefore conclude that the trial court erred by ordering defendant released from supervision.

⁴ The People have filed a request for judicial notice of two supposedly standard or typical waiver forms. We deny the request as irrelevant. (See fn. 3, *ante.*)

IV

DISPOSITION

The order appealed from is reversed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

MILLER
J.