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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Petitioner,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY,

Respondent;

MOURIS GHIPRIEL,

Real Party in Interest.

E061969

(Super.Ct.No. SWF1200303)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Angel M. Bermudez,
Judge. Petition granted.

Paul E. Zellerbach, District Attorney, and Ivy B. Fitzpatrick, Senior Deputy
District Attorney, for Petitioner.

No appearance for Respondent.

Law Offices of Paul Grech, Jr., Paul Grech, Jr., and Trenton C. Packer, for Real Party in Interest.

In this matter we have reviewed the petition and the opposition filed by real party in interest. We have determined that resolution of the matter involves the application of settled principles of law, and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

Real party in interest's conviction of assault with intent to rape (Pen. Code, § 220) makes him ineligible for probation unless the court finds the case to be unusual and that the interests of justice would be served by a grant of probation. (Pen. Code, § 1203.065, subd. (b)(2).) Although the decision whether to grant probation in these circumstances is committed to the trial court's sound discretion (*People v. Cazares* (1987) 190 Cal.App.3d 833, 837), the "unusual circumstances" set out in California Rules of Court, rule 4.413 are not to be read expansively. (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1227.)

Here, the trial court found that real party in interest was "aged" as specified in California Rules of Court, rule 4.413(c)(2)(C), having previously found that no other listed exception applied. We are not persuaded that given the record in this case, real party should be deemed aged based solely on his chronological age. His age does not decrease the risk of recidivism where he is now only three years older than he was at the time of the offenses; nor is he of such an age and presumed decrepitude so as to make

imprisonment unusually harsh. The fact (if it be a fact) that he is older than most criminal offenders and prison inmates is not what the rule requires.

Real party in interest also argues that he qualifies for probation because he has no prior record. That alone is insufficient. The relevant rule provision allows probation to be considered if “[t]he fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present . . . *and* the defendant has no recent record of committing similar crimes or crimes of violence” (Cal. Rules of Court, rule 4.413(c)(1)(A), italics added.) The trial court here expressly found that the disqualifying conviction here was *not* substantially less serious than most assaults with intent to rape, and did not abuse its discretion in so finding; hence, both prongs of the subdivision are not met.

DISPOSITION

Accordingly, the petition for writ of mandate is granted. Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to vacate its order granting probation to real party in interest, and to conduct a new sentencing hearing in accordance with this opinion.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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KING
J.

We concur:

HOLLENHORST
Acting P. J.

RICHLI
J.