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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO FELIPE GONZALES,

Defendant and Appellant.

E063992

(Super.Ct.No. RIF1404879)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Affirmed.

Armando Felipe Gonzales, in pro. per.; and Jennifer A. Gambale, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Armando Felipe Gonzales filed a petition for resentencing pursuant to Penal Code section 1170.18,¹ which the court denied. After

¹ All further statutory references are to the Penal Code unless otherwise indicated.

defendant filed the notice of appeal, this court appointed appellate counsel to represent defendant. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and identifying one potentially arguable issue: whether defendant is eligible for section 1170.18 resentencing.

Defendant was offered the opportunity to file a personal supplemental brief, which he has done. In his brief, defendant contends his constitutional right to due process was violated because the People offered no prima facie showing of defendant's conviction for a disqualifying offense. Defendant additionally argues he was deprived of his constitutional right to equal protection because, unlike petitioners not currently serving a prison sentence, section 1170.18 makes defendants who are currently serving a sentence ineligible for section 1170.18 relief if they have prior disqualifying convictions. We affirm.

I. PROCEDURAL HISTORY

On April 21, 2014, the People charged defendant by felony complaint with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 1) and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a); count 2). The People additionally alleged defendant had committed the offense in count 1 while out on bail (Pen. Code, § 12022.1), had suffered one prior prison term (Pen. Code, § 667.5, subd. (b)), and had suffered one prior strike conviction (Pen. Code, §§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). The People alleged that both the prior

prison term and the prior strike conviction derived from defendant's conviction on or about April 15, 1998, for attempted murder. (Pen. Code, §§ 664, 187.)

On October 1, 2014, defendant pled guilty to the count 1 offense and admitted the prior prison and conviction allegations.² In return, the People agreed to a total aggregate prison term of 44 months, consisting of the low term of 16 months on the count 1 offense, doubled due to the prior strike conviction, and a consecutive 12 months on the prior prison term allegation. The People agreed to dismissal of the remaining count and allegation. The court sentenced defendant as contemplated in his plea agreement.

On December 9, 2014, defendant filed a petition for resentencing. Defendant requested reduction in his sentence on count 1 to a misdemeanor pursuant to section 1170.18 and requested appointment of counsel at a hearing on the matter. The People filed a response in which they argued defendant was not entitled to the relief requested due to his prior conviction for attempted murder.

The court appointed counsel to represent defendant at the hearing on the request. At the hearing on June 26, 2015, the prosecutor stated: "I have presented the Court with a certified rap sheet laying out his prior attempted murder conviction."³ Defense counsel noted: "I have seen that, and I am in agreement." The court ruled "the defendant's

² Defendant simultaneously pled guilty to felony possession of a controlled substance (Health & Saf. Code, § 11377; count 4) in another case.

³ The rap sheet, which the court ordered filed as an exhibit, is not part of the record on appeal.

[section] 1170.18 petition is denied because he has a disqualifying felony, which is a super strike, the attempted murder”

II. DISCUSSION

A. *Due Process*

Defendant contends his constitutional right to due process was violated by the People’s failure to produce prima facie evidence of a prior disqualifying conviction. We disagree.

“In the criminal context . . . a due process challenge to an evidentiary presumption requires us to distinguish between mandatory presumptions, which either can be conclusive or rebuttable, and permissive inferences. [Citation.] Mandatory presumptions will violate due process if they relieve the prosecution of the burden of persuasion on an element of the offense. [Citations.] Permissive inferences violate due process only if the permissive inference is irrational. [Citations.]” (*People v. Goldsmith* (2014) 59 Cal.4th 258, 270.) A defendant is ineligible for section 1170.18 resentencing if he has been convicted for “[a]ny homicide offense, including any attempted homicide offense” (§§ 667, subd. (e)(2)(C)(iv)(IV), 1170.18, subd. (i).)

Here, defendant fails to cite any authority for the proposition that the People bore the burden of proving defendant was ineligible for resentencing. A *petitioner* generally bears the burden of producing sufficient evidence to establish a prima facie case for the relief requested. (See *In re Champion* (2014) 58 Cal.4th 965, 1006-1007 [defendant in petition for writ of habeas corpus “““bears a heavy burden initially to *plead* sufficient

grounds for relief, and then later to *prove* them.”””]); *In re D.P.* (2014) 225 Cal.App.4th 898, 903; *Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 389; *People v. Kim* (2009) 45 Cal.4th 1078, 1101 [defendant bears burden of producing evidence on petition for writ of *coram nobis*]; *In re Paul W.* (2007) 151 Cal.App.4th 37, 71 [“The petitioner has the burden of proving the factual contentions contained in the petition by a preponderance of the evidence.”]; *Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604, 612 [petitioner for conservatorship has the burden of producing evidence]; *In re Lucas* (2004) 33 Cal.4th 682, 735 [defendant bears burden of producing evidence on petition for writ of habeas corpus].) Thus, it was defendant’s burden to prove he was eligible for resentencing, not the People’s burden to prove he was ineligible.

In any event, we have before us the reporter’s transcript, the minute order, and defendant’s plea agreement in which he admitted having suffered a conviction for attempted murder. This is more than sufficient evidence to prove defendant was ineligible for resentencing pursuant to section 1170.18.

B. *Equal Protection*

Defendant additionally maintains he was denied his right to constitutional due process because he was treated dissimilarly to those individuals seeking section 1170.18 relief who are not currently serving a prison sentence. We disagree.

““The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly*

situated groups in an unequal manner.’ [Citations.]” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 overruled on another ground in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888.) “Under the equal protection clause, we do not inquire ‘whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.”’ [Citations.]” (*People v. Hofsheier, supra*, at pp. 1199-1200.)

“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.” (§ 1170.18, subd. (f).) “If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.” (§ 1170.18, subd. (g).)

First, we disagree with defendant’s interpretation of section 1170.18. Section 1170.18, subdivision (i) provides that the “provisions of this section shall not apply to persons who have one or more prior convictions for an offense specified in” section 667, subdivision (e)(2)(C)(iv). The statute makes no exemption from this disqualifying factor for those who have been released from prison.

Second, defendant, who is incarcerated, is not similarly situated to unincarcerated petitioners seeking relief pursuant to section 1170.18. Indeed, defendant is not only seeking redesignation of his offense as a misdemeanor, but is also seeking a reduced

sentence. An unincarcerated individual seeking redress pursuant to section 1170.18 has already served his time in prison and is seeking only redesignation of the offense for future purposes. Thus, it would appear more violative of equal protection to allow those who just happen to remain incarcerated to obtain both a reduced sentence and redesignation of the offense when those who have already served their entire sentence would only qualify for redesignation of the offense. Under *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the record and find no arguable issues.

III. DISPOSITION

The judgment is affirmed.

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KING
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.