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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS WAYNE ALLEN, JR.,

Defendant and Appellant.

F063588

(Super. Ct. Nos. SCR008061C &
SCR009050)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. Charles A. Wieland, Judge.

Deborah Prucha, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Poochigian, J. and Detjen, J.

Defendant Thomas Wayne Allen, Jr., was sentenced to prison on September 1, 2011. He now contends he is entitled to be resentenced pursuant to Penal Code section 1170, subdivision (h), which became operative on October 1, 2011.¹ We affirm.

PROCEDURAL HISTORY

On July 8, 2008, defendant was placed on probation for three years in Madera County Superior Court case No. SCR008061C, having pled guilty to second degree burglary. (§ 459.)² On February 3, 2009, defendant admitted violating his probation by committing the offense that resulted in Madera County Superior Court case No. SCR009050.

On March 5, 2009, defendant was placed on probation for five years in case No. SCR009050, having pled guilty to unauthorized use of personal identifying information. (§ 530.5, subd. (a).) Probation in case No. SCR008061C was reinstated.

On July 26, 2011, defendant admitted violating his probation in both cases by failing to report to the probation officer as directed, failing to attend substance abuse counseling as ordered, and leaving California without permission. He entered his admissions with the understanding he would be sentenced to no more than two years.

On September 1, 2011, defendant requested that sentencing be continued until October 3, 2011, to allow him to serve his time locally pursuant to section 1170, subdivision (h). The trial court denied the request on the ground the plea was negotiated based on the law in effect at the time of the incidents and when the agreement was made. Defendant was then sentenced to prison for 16 months in case No. SCR009050, plus a consecutive eight-month term in case No. SCR008061C, for an aggregate term of two years. He was also ordered to pay various fees and fines.

¹ All statutory references are to the Penal Code.

² The facts of the offenses are not pertinent to this appeal.

DISCUSSION

On April 4, 2011, the Governor approved the “2011 Realignment Legislation addressing public safety” (Stats. 2011, ch. 15, § 1), which, together with subsequent related legislation, significantly changed the sentencing and supervision of persons convicted of felony offenses.³ The sentencing changes made by the Act apply, by its express terms, “prospectively to any person sentenced on or after October 1, 2011.” (§ 1170, subd. (h)(6).) The question raised on appeal is whether defendant, who was sentenced before October 1, 2011, but whose conviction is not yet final, is entitled to be resentenced under the Act’s provisions, specifically subdivision (h) of section 1170. As we recently stated in *People v. Cruz* (2012) 207 Cal.App.4th 664 [2012 Cal.App. Lexis 778, *2] (*Cruz*), “the answer is no. The sentencing changes made by the Act apply only to persons sentenced on or after October 1, 2011, and such prospective-only application does not violate equal protection.” (Fn. omitted.)

In *Cruz*, we explained that “[t]he Act shifted responsibility for housing and supervising certain felons from the state to the individual counties. Thus, insofar as is germane to this appeal, the Act provides that, once probation has been denied, felons who are eligible to be sentenced under realignment will serve their terms of imprisonment in local custody rather than state prison.” (*Cruz, supra*, 2012 Cal.App. Lexis at pp. *6-*7, fn. omitted.) The offenses of which defendant was convicted and for which he was sentenced to prison now require, if probation is denied, imposition of a county jail sentence. (§ 461, subd. (b), as amended by Stats. 2011, ch. 15, § 355, eff. Apr. 4, 2011, operative Oct. 1, 2011; § 530.5, subd. (a), as amended by Stats. 2011, ch. 15, § 383, eff. Apr. 4, 2011, operative Oct. 1, 2011.) Had defendant been sentenced on or after

³ We refer to the initial enactment and subsequent legislation collectively as “the Act.”

October 1, 2011, he would have been eligible for sentencing under the Act. (See § 1170, subd. (h)(3).)

As we stated in *Cruz*, however, even if we assume the Act has at least some mitigating effect on punishment (*Cruz, supra*, 2012 Cal.App. Lexis at pp. *11-*12, fn. 8), prospective-only application does not run afoul of rules of statutory construction. This is so because, insofar as subdivision (h) of section 1170 is concerned, “the Act contains both a saving clause, expressly providing for prospective application of its terms to persons sentenced on or after October 1, 2011, and a postponed operative date.” (*Cruz, supra*, at p. *13, fn. omitted.) Accordingly, section 3 (“[n]o part of it is retroactive, unless expressly so declared”) controls, and the rule of *In re Estrada* (1965) 63 Cal.2d 740 does not apply. (*Cruz, supra*, at pp. *9-*11; cf. *People v. Floyd* (2003) 31 Cal.4th 179, 183-185, 187.)

Nor does prospective-only application violate the equal protection guarantees contained in the Fourteenth Amendment to the United States Constitution and article I, section 7, subdivision (a) of the California Constitution. We assume, as the People implicitly concede, that defendant has met the threshold requirement of a meritorious equal protection claim by demonstrating the state has adopted a classification that affects similarly situated groups — those sentenced before October 1, 2011, and those sentenced on or after that date — in an unequal manner. (See, e.g., *Reed v. Reed* (1971) 404 U.S. 71, 75-76; *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199-1200; *People v. Guzman* (2005) 35 Cal.4th 577, 591-592.) As we concluded in *Cruz*, however, this classification withstands the scrutiny required by an equal protection analysis (*Cruz, supra*, 2012 Cal.App. Lexis at pp. *16-*26). First, the Act bears a rational relationship to the purposes stated by the Legislature: reduction of recidivism and improvement of public safety (both of which are legitimate purposes), while simultaneously reducing corrections

and related criminal justice spending.⁴ (*Cruz, supra*, at p. *26.) Second, the distinction drawn based on sentencing date is necessary to further the Act's purpose by (a) allowing counties to muster the resources to deal with the influx of prisoners and develop the necessary community-based programs and punishments the Act requires; (b) preventing county jails from being overwhelmed with numbers of inmates for which local authorities are unprepared, which in turn could result in those authorities having to take actions that severely impact public safety; and (c) preventing trial court resources from being overwhelmed with the resentencing of numerous inmates. (*Cruz, supra*, at pp. *26-*27.)

“The distinction drawn by section 1170, subdivision (h)(6), between felony offenders sentenced before, and those sentenced on or after, October 1, 2011, does not violate equal protection. Accordingly, defendant's existing sentence is lawful, and he is not entitled to a remand for resentencing under the Act's provisions.” (*Cruz, supra*, 2012 Cal.App. Lexis at pp. *28-*29.)

DISPOSITION

The judgment is affirmed.

⁴ The protection of public safety and prevention of recidivism are compelling state interests. (See *People v. Travis* (2006) 139 Cal.App.4th 1271, 1292; *Guevara v. Superior Court* (1998) 62 Cal.App.4th 864, 872.)