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

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDY MENDEZ,

Defendant and Appellant.

F063704

(Super. Ct. Nos. VCF175711 &
VCF184347B)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

John K. Jackson for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Carlos A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Kane, J. and Poochigian, J.

INTRODUCTION

Appellant Randy Mendez argues that the trial court erred by refusing to dismiss two felony convictions pursuant to Penal Code¹ section 1203.4, subdivision (a)(1) or to reduce the offenses to misdemeanors pursuant to section 17, subdivision (b). We are not convinced. The judgment will be affirmed.

FACTS

On July 5, 2007, appellant pled no contest to one count of grand theft of a firearm (case No. VCF175711) and to one count of discharging a firearm with gross negligence (case No. VCF184347B). (§§ 487, subd. (a), 246.3, subd. (a).)

The probation report states that Tulare Police Department reports indicate that appellant stole a .45-caliber semi-automatic handgun from a private residence on October 16, 2006. On the evening of May 5, 2007, appellant admitted to a police officer that he fired a .40-caliber handgun into the air.

Appellant was sentenced on the grand theft conviction to two years in state prison; execution of the sentence was suspended for three years, which was fixed as the term of probation. He was ordered to serve 135 days in county jail as a condition of probation. The same sentence was imposed for the firearm discharge conviction. The two periods of local custody were ordered to run consecutively.

On June 22, 2011, appellant filed a petition for dismissal pursuant to section 1203.4 for each conviction (dismissal petitions). Therein, he also asked for the convictions to be reduced to misdemeanors pursuant to section 17. Appellant did not file any documentary evidence in support of the dismissal petitions.

The People opposed the dismissal petitions.

¹ Unless otherwise specified all statutory references are to the Penal Code.

Hearing on the dismissal petitions was held on August 30, 2011. Appellant did not offer any supporting evidence at the hearing.

The dismissal petitions were denied on September 23, 2011, without explanation.

DISCUSSION

I. The Trial Court Properly Denied The Dismissal Petitions.

Appellant argues the trial court erred by denying the dismissal petitions because he “has fulfilled all of the requirements and conditions of probation for the entire period thereof and should have had his charges reduced and dismissed pursuant to Penal Code [section] 1203.4.” Respondent argues the trial court properly denied the dismissal petitions because appellant did not proffer any evidence proving he satisfied the statutory requirements for relief. Respondent is correct.

Section 1203.4, subdivision (a)(1) provides, in relevant part:

“In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, ... the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; ... the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense” (§ 1203.4, subd. (a)(1).)

To be entitled to relief pursuant to subdivision (a)(1) of section 1203.4, the petitioner bears the burden of proving all of the following elements: (1) he fulfilled all the conditions of his probation for the entire period; (2) he was not serving a sentence on another offense; (3) he was not on probation for another offense; and (4) he was not charged with commission of another offense.² “On application of a defendant who meets the requirements of section 1203.4 the court not only can but must proceed in

² Appellant did not seek discretionary relief in the interests of justice.

accord with that statute. [Citations.]’ [Citation.]” (*People v. Arata* (2007) 151 Cal.App.4th 778, 783.)

Appellant did not satisfy his burden of proof. “[A] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” (Evid. Code, § 500.) “The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact.” (Evid. Code, § 550, subd. (b).) Appellant did not proffer any documentary or testimonial evidence proving that he satisfied the requirements of Penal Code section 1203.4, subdivision (a)(1). He did not prove that he fulfilled the conditions of probation for the entire period. He did not show that, at the time the dismissal petitions were filed, he was not charged with commission of another offense and was not serving a sentence or on probation for another offense. In the absence of proof that appellant satisfied the requirements of section 1203.4, subdivision (a)(1), the trial court properly denied the dismissal petitions.³

Further, the dismissal petitions are legally deficient. Appellant completed a copy of form CR-180, which is approved for optional use by the Judicial Council of California (revised Jan. 1, 2010), for each conviction. He signed the forms under penalty of perjury. In each form appellant checked contradictory boxes. He checked box number “3,” indicating that probation *was* granted for the listed conviction. He also checked the subsection “a” box underneath box number “3,” indicating that he fulfilled all the conditions of probation for the entire period. Yet, appellant also checked box number

³ Appellant’s “Motion for Reviewing Court to Take Evidence,” that was filed on March 13, 2012, is denied. “It has long been the general rule and understanding that ‘an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.’ [Citation.]” (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) “On appeal ... we review the appellate record for error, without considering matters not presented to the trial court.” (*People v. Leonard* (2007) 40 Cal.4th 1370, 1393.) No exceptional circumstances appear.

“4,” indicating that probation *was not* granted for the listed conviction. Appellant cannot have been granted probation and not granted probation for the same conviction.

II. The Trial Court Properly Declined To Reduce The Convictions To Misdemeanors.

Section 17, subdivision (b) provides:

“(b) 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:

“(1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. [¶]...[¶]

“(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.”

Appellant asserts that the crime of stealing a firearm in violation of section 487, subdivision (a) and recklessly discharging a gun in violation of section 246.3, subdivision (a) may be sentenced by the court, in its discretion, as either a felony or misdemeanor. Based on this premise, appellant argues that the trial court erred by declining his request to reduce both convictions to misdemeanors pursuant to section 17, subdivision (b). We are not persuaded.

The trial court did not err by refusing to reduce the firearm discharge conviction to a misdemeanor. Violation of section 246.3, subdivision (a) “shall be punished by imprisonment in county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.” (§ 246.3, subd. (a).) Thus, the crime is a wobbler. Yet this does not end the analysis. Respondent correctly argues that a crime cannot be reduced from a felony to a misdemeanor if the trial court has imposed a prison term for the offense. (*People v. Wood* (1998) 62 Cal.App.4th 1262, 1266-1267.) “Imposition of a

prison term, whether or not suspended, render[s] the offense a felony.” (*Id.* at p. 1267.) Confinement in county jail as a condition of probation does “not constitute a sentence within the meaning of Penal Code section 17.” (*People v. Esparza* (1967) 253 Cal.App.2d 362, 365.) Since the trial court imposed and stayed a two-year term of imprisonment for the firearm discharge conviction, this offense was not reducible to a misdemeanor under section 17, subdivision (b)(1). (*People v. Wood, supra*, 62 Cal.App.4th at p. 1267.)

The trial court did not err by refusing to reduce the grand theft conviction to a misdemeanor. The crime of stealing a firearm in violation of section 487, subdivision (a) is a straight felony crime. Section 489, subdivision (a) provides that grand theft of a firearm is punishable “by imprisonment in the state prison for 16 months, two or three years.” (§ 489, subd. (a).) “Any crime punishable by death or incarceration in a state prison is a felony. (Pen. Code, § 17, subd. (a))” (*People v. Mauch* (2008) 163 Cal.App.4th 669, 674.) Since the Legislature has classified grand theft of a firearm as a felony without providing for alternate punishment, the trial court would have acted in excess of its jurisdiction if it had purported to reduce this offense to a misdemeanor. (*Ibid.*)

DISPOSITION

The judgment is affirmed. Appellant’s “Motion for Reviewing Court to Take Evidence,” is denied.