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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY PONZIANI,

Defendant and Appellant.

G047490

(Super. Ct. No. M14298)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Craig E. Robison, Judge. Affirmed as modified.

William P. Daley for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Larry Ponziani appeals from an order granting his petition for a certificate of rehabilitation pursuant to Penal Code section 4852.01 (all further statutory references are to this code), but finding he was not entitled to relief from the duty to register as a sex offender under section 290. He argues that upon his successful completion of probation, his underlying conviction for violation of section 289, subdivision (h), was automatically deemed a misdemeanor and consequently his certification of rehabilitation entitled him to be relieved of the obligation to register as a matter of law.

The Attorney General agrees with defendant, and joins him in asking this court to modify the trial court's order so as to make it clear he is relieved of the registration requirement. Fortunately we agree as well, because only rarely are we presented with the opportunity to make both appellant and respondent happy on appeal and we have no inclination to waste it. We consequently modify the order appealed from, to specify defendant is relieved of the obligation to register under section 290.

FACTS

In 1997, defendant was convicted of violating section 289, subdivision (h), which prohibits "participat[ing] in an act of sexual penetration with another person who is under 18 years of age." Imposition of his sentence was suspended, and he was placed on probation for three years with conditions including service of a term in county jail. In June 2001 defendant's conviction was set aside and the accusation dismissed pursuant to section 1203.4 and in May 2005 the court granted "[a] defense request to reduce charge to a misdemeanor"

In June 2012 defendant petitioned the court for a certificate of rehabilitation. The court granted the petition, but found defendant was nonetheless ineligible to be relieved of the obligation to register as a sex offender under section 290, because his original conviction for violation of section 289, subdivision (h), was a felony.

The court acknowledged the offense had been officially reduced to a misdemeanor pursuant to section 17, subdivision (b), but reasoned it was the treatment of the offense at the time of conviction that controlled.

DISCUSSION

Section 17, subdivision (a), states the general rule for what constitutes a felony and what constitutes a misdemeanor: “A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.”

Section 289, subdivision (h), the statute defendant was convicted of violating, is what is commonly referred to as a “wobbler,” because it gives the trial court discretion to treat a violation as either a felony (by sentencing the defendant to a term in state prison), or a misdemeanor (by sentencing the defendant to a term not to exceed one year in county jail). However, section 17 specifies that a wobbler will be officially declared a misdemeanor “for all purposes” under various circumstances, including “[w]hen 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.” (§ 17, subd. (b)(3).)

That is what occurred here. The record reflects that following defendant’s conviction, the court stayed imposition of sentence and placed defendant on probation for a term of three years. After his successful completion of that probationary term, defendant’s conviction was set aside and the accusation dismissed. The court later entered an order officially declaring the charge to be a misdemeanor. Consequently, defendant’s conviction was required to be treated, *for all purposes*, as a misdemeanor.

Section 290.5, subdivision (a)(1), mandates that whenever a person who is “required to register under Section 290 for an offense [other than those specifically listed as exempt],” obtains a certificate of rehabilitation, that person “*shall be relieved of any further duty to register under Section 290 if he or she is not in custody, on parole, or on probation.*” (Italics added.) A “felony” violation of subdivision (h) of section 289 is among the crimes exempted from this mandatory relief, but a *misdemeanor* violation of that statute – which is what defendant’s was deemed to be – is not. Consequently, under the terms of that statute, the trial court was obligated to relieve defendant from any further duty to register under section 290 when it granted his certificate of rehabilitation.

DISPOSITION

The order granting defendant’s petition for a certificate of rehabilitation is modified to reflect defendant is relieved of any further duty to register under section 290. As modified, the order is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O’LEARY, P. J.

THOMPSON, J.