

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE DEJESUS FLORES,

Defendant and Appellant.

G051133

(Super. Ct. No. R-01392)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Sheila F. Hanson, Judge. Reversed.

Allison L. Ehlert, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

Jose DeJesus Flores appeals from a postjudgment order revoking his postrelease community supervision (PRCS) and sentencing him to jail. He claims the court erred by ordering him to jail under Penal Code section 3455 (all statutory references are to this code) instead of drug treatment under section 3063.1. We agree.

### **FACTS AND PROCEDURAL HISTORY**

Flores pled guilty to possessing methamphetamine for sale and was sentenced to 16 months in state prison. In 2012 he left prison on PRCS under the county probation department.

In March 2013, Flores was arrested and served a 10-day PRCS flash incarceration for possessing and transporting controlled substances. In May, Flores was arrested and served another 10-day PRCS flash incarceration for failing to report to probation, and for possessing marijuana and an open container while driving.

In April 2014, the probation department filed a petition to revoke Flores's PRCS which alleged he had tested positive for methamphetamine, had failed to attend a probation appointment, and had been arrested for possessing a controlled substance and burglary tools. Flores admitted the allegations, and the court revoked and reinstated his PRCS on condition he serve 120 days in county jail.

In August 2014, the probation department filed a second petition to revoke Flores's PRCS which alleged he had tested positive and had been arrested for possession of methamphetamine. Flores denied the allegations. At a PRCS revocation hearing Flores's probation officer testified he had found methamphetamine in Flores's car. No evidence regarding the other alleged violations was offered.

Flores's counsel argued the court was required to order Flores to drug treatment under section 3063.1 (enacted by the voters as part of Proposition 36 in 2000), rather than jail under section 3455 (enacted by the Legislature as part of the Postrelease Community Supervision Act of 2011). Further, to the extent section 3455 provided otherwise, it was an invalid amendment of Proposition 36.

The court found Flores had possessed methamphetamine in violation of the terms of his PRCS. The court regarded Flores's Proposition 36 argument as "interesting" and speculated a "higher authority" might agree with it. But the court declined to order drug treatment under section 3063.1, and instead revoked and reinstated his PRCS on condition he serve 180 days in county jail under section 3455.

### **DISCUSSION**

The People urge us to dismiss this appeal as moot because Flores has completed his sentence, and he has since pled guilty to "a misdemeanor not related to the use of drugs" which disqualifies him from drug treatment. (§ 3063.1, subd. (b)(2).) We decline to dismiss this appeal and we exercise our discretion to decide it on the merits because the challenged order may yet have "disadvantageous collateral consequences." [Citation.] (*People v. Ellison* (2003) 111 Cal.App.4th 1360, 1368-1369.)

Three months after the challenged order was issued, another panel of our court agreed with the Proposition 36 argument unsuccessfully advanced by Flores below. (*People v. Armogeda* (2015) 233 Cal.App.4th 428 (*Armogeda*) [section 3455 unconstitutional to the extent it authorizes incarceration instead of treatment under circumstances not permitted by section 3063.1].) Flores asserts this case is controlled by *Armogeda* and the same result must obtain – the challenged order must be reversed.

The People do not challenge *Armogeda*. However, they contend it does not control because the court found Flores posed "a danger to the safety of others" within the meaning of section 3063.1, subdivision (d)(1), an exception which authorizes incarceration instead of drug treatment. They note the court stated: "But there is a continuing behavior here that the court believes does pose a danger to the public if he were merely to be released only with drug treatment without any additional punishment because since [sic] he has violated in the past, since probation has tried flash incarcerations in the past and it does not appear to have stopped [him] from acting out, it does appear appropriate in this court's mind to revoke the period of supervision."

Flores maintains the court's "danger to the public" comment was merely an aside, not a finding Flores was disqualified from drug treatment under section 3063.1, subdivision (d)(1). This argument has merit. The court said it was not going to "extend the law" of Proposition 36 to the PRCS context. Thus, it expressly rejected the notion section 3063.1 applied at all in this case. Further, the court gave no indication it was making an alternative ruling under section 3063.1, subdivision (d)(1). In fact, there was no reason for the court to do so, because the prosecutor never argued Flores should be disqualified from drug treatment as a danger to the safety of others.

Alternatively, Flores argues if the court's danger to the public comment was a finding it is not supported by substantial evidence, even under the comparatively lenient preponderance of the evidence standard applicable in the context of a PRCS revocation hearing. This argument is persuasive.

It is true, as the People observe, the verified petition for revocation of PRCS alleged Flores had previously been "arrested or convicted" of stalking, making terrorist threats and burglary, in addition to many drug related offenses. But it is also true, as Flores notes, the court did not refer to or rely on the alleged non-drug-related offenses at all. More importantly, there was no *evidence* before the court concerning the circumstances of the alleged non-drug-related offenses, such as how long ago they occurred, and whether they were merely arrests or actually resulted in convictions.

Under these circumstances, Flores's alleged non-drug-related offenses cannot support a danger to the safety of others exception. "To be sufficient, evidence must be 'substantial.' [Citations.] Evidence is substantial only if it "reasonably inspires confidence and is of 'solid value.'" [Citation.] By definition, 'substantial evidence' requires *evidence* and not mere speculation. . . . A reasonable inference, however, "may not be based on suspicion . . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'" [Citations.]" (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002.)

**DISPOSITION**

The order is reversed.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.