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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.

BRETT MORGAN,

Defendant and Appellant.

G051147

(Super. Ct. No. 11HF1716)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Christopher J. Evans, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)

Affirmed in part; reversed in part; and remanded with directions.

Christian C. Buckley, 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, Arlene A. Sevidal and
Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

Brett Morgan appeals from a postjudgment order granting his petition to recall his felony conviction, reduce it to a misdemeanor, and resentence him. Morgan argues the trial court erred by imposing one year of parole because he was not still serving a sentence when he was on postrelease community supervision. Alternatively, Morgan contends his excess custody credits should reduce his parole time and fines. As we explain below, we disagree with his first argument but agree with his second contention. We affirm in part, reverse in part, and remand with directions.

FACTS

In July 2011, a complaint charged Morgan with count 1, unlawful possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The information alleged Morgan had one prior strike conviction (Pen. Code, §§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1), all further statutory references are to the Pen. Code, unless otherwise indicated), and had served three prior prison terms (§ 667.5, subd. (b)).

In October 2011, Morgan pleaded guilty to count 1 and admitted the strike allegation and two prior prison term allegations. The factual basis for the plea was that on July 8, 2011, Morgan unlawfully possessed a usable quantity of methamphetamine. In his plea agreement, Morgan acknowledged he was subject to postrelease community supervision (PRCS) for three years. On the prosecutor's motion, the trial court dismissed the remaining prior prison term allegation. The court sentenced Morgan to four years in prison, suspended, three years of formal probation, and 174 days in county jail, with 174 days of custody credits. The court ordered him to pay a \$200 restitution fine (§ 1202.4) and a \$200 PRCS fine (§ 1202.44), and ordered him to register pursuant to Health and Safety Code section 11590.

In February 2013, after he violated his probation, the trial court sentenced Morgan to two years in prison followed by PRCS, with 288 days of presentence custody credits. The court struck his prior conviction and prison sentences.

In November 2014, Morgan filed an application pursuant to section 1170.18, subdivision (f), to have his prior felony conviction for violation of Health and Safety Code section 11377, subdivision (a), designated as a misdemeanor or, alternatively, to recall his sentence, pursuant to section 1170.18, subdivision (a).

At a hearing on the motion, defense counsel informed the trial court Morgan served two years in prison on the underlying offense and that he had been on PRCS since September 2013. Counsel argued section 1170.18, subdivision (f), was applicable. After counsel indicated she did not intend to call any witnesses and submitted, the court declined to grant the petition under section 1170.18, subdivision (f), but instead granted the petition under subdivision (a), to which defense counsel objected. The trial court sentenced Morgan to 365 days in county jail, with 365 days of credits, and one year of parole.

DISCUSSION

One Year of Parole

Morgan argues the trial court erred by imposing parole because he was on PRCS and not “currently serving a sentence for a conviction.” We disagree.

In 2011, the Legislature enacted what it called “the 2011 Realignment Legislation addressing public safety.” (Stats. 2011, ch. 15, § 1.) “In the wake of realignment, a person released from prison is subject to a period of either parole (§ 3000 et seq.) or [PRCS] (§ 3450 et seq.). [Citation.] Parole applies to high-level offenders, i.e., third strikers, high-risk sex offenders, and persons imprisoned for serious or violent felonies or who have a severe mental disorder and committed specified crimes. (§ 3451, subd. (b).) All other released persons are placed on [PRCS]. (§ 3451, subd. (a).)” (*People v. Armogeda* (2015) 233 Cal.App.4th 428, 434.)

“On November 4, 2014, the voters enacted Proposition 47, ‘the Safe Neighborhoods and Schools Act’ (hereafter Proposition 47), which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*)). “Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors). Proposition 47 did the following: (1) added chapter 33 to the Government Code (§ 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 . . . , and (3) amended . . . sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377. [Citation.]” (*Rivera, supra*, 233 Cal.App.4th at p. 1091.)

Proposition 47 added section 1170.18. Section 1170.18 in relevant part provides:

“(a) A person *currently serving a sentence* for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (“this act”) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with [s]ections 11350, 11357, or 11377 of the Health and Safety Code, or [s]ection 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.

“(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to [s]ections 11350, 11357, or 11377 of the Health and Safety Code, or [s]ection 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable

risk of danger to public safety. In exercising its discretion, the court may consider all of the following: [¶] (1) The petitioner’s criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes. [¶] (2) The petitioner’s disciplinary record and record of rehabilitation while incarcerated. [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety. [¶] . . . [¶]

“(f) 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.” (Italics added.)

The issue here is whether someone who is on PRCS is “currently serving a sentence” or “has completed his or her sentence.” *People v. Morales* (2015) 238 Cal.App.4th 42 (*Morales*), is instructive. In that case, the same panel of this court held PRCS was part of the felony sentence and because defendant was on PRCS when he filed his petition under section 1170.18, “he was still serving his sentence and thus subject to the parole requirement.” (*Morales, supra*, 238 Cal.App.4th at p. 48.) In doing so, the *Morales* court harmonized sections 1170.18’s, 3000’s, and 1170’s various uses of the word “sentence,” and their modifiers, to conclude PRCS is part of a felony sentence. We find *Morales* persuasive and follow it here.

Excess Custody Credits

Morgan contends that if we conclude, as we do, he is subject to one year of parole, his excess custody credits should reduce his parole period. Again, *Morales, supra*, 238 Cal.App.4th 42, is instructive.

In *Morales, supra*, 238 Cal.App.4th at page 50, this court explained the general rule is that a person subject to parole is entitled to credit excess custody time against the parole period and the voters must have known this when they enacted Proposition 47. The *Morales* court stated, “There is no clear indication the voters intended to change the law on this front; to the contrary, they expressly retained all ‘otherwise available’ remedies. [Citation.]” (*Ibid.*) Thus, any excess custody credits may reduce Morgan’s parole period.

As to fines, the *Morales* court explained section 2900.5, subdivision (a), authorizes excess custody credits to be “‘credited to any fine, including, but not limited to, base fines, on a proportional basis, that may be imposed, at the rate of not less than thirty dollars (\$30) per day, or more, in the discretion of the court imposing the sentence[,]’” and because section 1170.18 says nothing about fines, and credit against applicable fines is an available remedy. (*Morales, supra*, 238 Cal.App.4th at pp. 51-52.) Thus, any excess custody credits may reduce Morgan’s fines.

Morgan also claims the trial court erred in imposing a \$200 restitution fine (§ 1202.4) and a \$200 PRCS fine (§ 1202.44). Morgan failed to object to these fines below and thus has forfeited the issue. (*Morales, supra*, 238 Cal.App.4th at p. 52, fn. 4.)

Finally, Morgan asserts the trial court’s order requiring him to register pursuant to Health and Safety Code section 11590 must be stricken because that requirement does not apply to misdemeanor convictions. The Attorney General agrees, correctly citing to Health and Safety Code section 11590, subdivision (c). Thus, we strike the order requiring Morgan to register pursuant to Health and Safety Code section 11590.

DISPOSITION

The matter is remanded to the trial court with instructions to recalculate Morgan’s parole period consistently with this opinion, and to apply any excess credits against any applicable fines Morgan owes. The order requiring Morgan to register

pursuant to Health and Safety Code section 11590 is struck. In all other respects the postjudgment order is affirmed.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.