

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

REYNALDO C. ACIDERA,

Defendant and Appellant.

H042312

(Monterey County

Super. Ct. No. SS082508A)

Defendant Reynaldo C. Acidera appeals from the denial of his petition for resentencing under Proposition 47. (Pen. Code, § 1170.18.)¹ The trial court ruled that defendant, who was on probation at the time of the hearing, was ineligible for resentencing because he was not “serving a sentence” as required by § 1170.18.

On appeal, defendant contends the trial court erred because a defendant who is on probation for the underlying offense is “currently serving a sentence” within the meaning of § 1170.18, subdivision (a). The Attorney General concedes the issue. We agree with the parties that a defendant on probation is “currently serving a sentence” under Proposition 47. (*People v. Davis* (2016) 246 Cal.App.4th 127 (*Davis*)). Accordingly, we will reverse the order denying defendant’s petition and remand for reconsideration of the petition.

¹ Subsequent undesignated statutory references are to the Penal Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts of the Offense*²

On July 30, 2008, police stopped defendant for making a sudden lane change without signaling. A records check revealed an outstanding warrant for defendant's arrest. Police observed signs of intoxication and determined defendant was under the influence of a controlled substance. A search of defendant's vehicle yielded a glass methamphetamine pipe and a small bag of marijuana. In the trunk of the car, police found a "slim jim," a long metal strip with a hooked end that can be used to enter locked vehicles. During the booking process, police found a pill containing methyldioxymethamphetamine (MDMA), commonly known as ecstasy, in defendant's pants pocket. Defendant stated that the marijuana, the MDMA, and the glass pipe were for his personal use.

B. *Procedural Background*

The prosecution charged defendant by felony complaint with eight counts: Count One—Transportation of a controlled substance (Health & Saf. Code, former § 11379, subd. (a)); Count Two—Possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)); Count Three—Driving under the influence (Veh. Code, § 23152, subd. (a)); Count Four—Being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)); Count Five—Possession of burglar's tools (§ 466); Count Six—Possession of controlled substance paraphernalia (Health & Saf. Code, § 11364); Count Seven—Possession of marijuana while driving (Veh. Code, § 23222, subd. (b)); and Count Eight—Driving with a suspended or revoked license (Veh. Code, § 14601.1, subd. (a)). In January 2009, defendant pleaded no contest to possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and reckless driving in connection with the consumption of alcohol (Veh. Code, §§ 23103, 23103.5, subd. (a)).

² Our statement of the facts is based on the facts set forth in the probation report.

At sentencing, the trial court suspended sentence and granted a three-year term of probation. In August 2009, the trial court summarily revoked probation and issued a bench warrant for defendant's arrest. The bench warrant was returned as served and filed in December 2014. In February 2015, defendant admitted violating his probation. The trial court revoked probation and reinstated another three-year term of probation.

On February 20, 2015, defendant filed a Proposition 47 petition to recall his sentence for possession of a controlled substance. The prosecution opposed the petition on the ground that defendant had not yet been sentenced for that offense. At a hearing on May 1, 2015, the trial court denied the petition on the ground that defendant was on probation and therefore had not been sentenced. Defendant then declined the terms of his probation, whereupon the trial court denied probation and imposed a term of 16 months in prison. The trial court then recalled that sentence, reduced the conviction for possession of a controlled substance to a misdemeanor, and placed defendant on parole for one year.

Defendant appeals from the initial denial of his petition for resentencing.

II. DISCUSSION

Defendant contends the trial court erred by denying his petition for resentencing under Proposition 47 because a defendant on probation is "currently serving a sentence" within the meaning of section 1170.18, subdivision (a). The Attorney General concedes the merit of this claim and asks that we remand to the trial court for further consideration of defendant's petition. We agree with the parties and accept the Attorney General's concession.³

³ The Attorney General does not contend this appeal was mooted by the trial court's subsequent reduction of the conviction to a misdemeanor. Because remand will give the trial court "an opportunity to restructure its sentencing choices," *People v. Rodriguez* (2009) 47 Cal.4th 501, 509, we do not consider the appeal moot.

The First District Court of Appeal recently considered this issue in *Davis, supra*, 246 Cal.App.4th 127. In that case, the defendant argued that the phrase “currently serving a sentence” only includes defendants who are serving a term of confinement and does not include probationers. The Attorney General disagreed, arguing that the word “sentence” includes any criminal sanction, including probation. (*Id.* at p. 139.) The court of appeal held that “persons on probation for a felony conviction are ‘currently serving a sentence’ ” within the meaning of section 1170.18, subdivision (a). (*Id.* at p. 132.)

We agree with the analysis in *Davis*, and we will accept the Attorney General’s concession. We hold that a defendant on felony probation is “currently serving a sentence” for purposes of a section 1170.18 recall petition. The trial court therefore erred when it found defendant ineligible for Proposition 47 resentencing because he was on probation.

III. DISPOSITION

The initial order denying defendant’s petition for resentencing under Penal Code section 1170.18 is reversed, and the matter is remanded to the trial court for further consideration of the petition.

Márquez, J.

WE CONCUR:

Rushing, P.J.

Premo, J.