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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RECIA LEE ESTEBAN,

Defendant and Appellant.

H042626

(Monterey County

Super. Ct. Nos. SS132156A,

SS140667A)

I. INTRODUCTION

In case No. SS132156A, defendant Recia Lee Esteban, pleaded no contest to possession of methamphetamine (former Health & Saf. Code, § 11377, subd. (a)) and admitted that she had served one prior prison term (Pen. Code, § 667.5, subd. (b)).¹ In case No. SS140667A, defendant pleaded guilty to possession of methamphetamine (former Health & Saf. Code, § 11377, subd. (a)) and admitted that she had served two prior prison terms (§ 667.5, subd. (b)). Defendant was placed on probation in both cases and later admitted to violating probation in both cases.

In the meantime, section 1170.18 was enacted by the voters as part of Proposition 47, which reclassified certain offenses as misdemeanors. Defendant petitioned for recall of her sentences and resentencing to misdemeanors under

¹ All further statutory references are to the Penal Code unless otherwise indicated.

section 1170.18 with respect to her felony drug convictions. At the sentencing hearing on the probation violations, the trial court determined that defendant was not serving a sentence within the meaning of section 1170.18 while on probation, and that therefore she was not eligible to have her felony drug convictions resentenced as misdemeanors. Defendant subsequently declined probation in order to have the court sentence the drug convictions as misdemeanors. The court proceeded to revoke and terminate probation in both cases, order the execution of felony sentences for defendant's drug convictions, lift the stays on previously imposed probation revocation restitution fines, and then immediately recall the sentences and resentence defendant to misdemeanors.

On appeal defendant contends, among other arguments, that she was "currently serving a sentence" within the meaning of section 1170.18, subdivision (a) while on probation. She argues that the trial court therefore erred by requiring her to decline probation in order to be resentenced to misdemeanors, by ordering the execution of the felony sentences, and by lifting the stay on previously imposed probation revocation restitution fines, all before resentencing her drug offenses as misdemeanors. The Attorney General concedes that the trial court erred.

For reasons that we will explain, we agree and we will modify the orders.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Defendant's Conviction in case No. SS132156A

In 2013, in case No. SS132156A, defendant pleaded no contest to possession of methamphetamine (former Health & Saf. Code, § 11377, subd. (a)) and admitted that she had served one prior prison term (§ 667.5, subd. (b)). The trial court suspended imposition of sentence and placed defendant on Proposition 36 probation (see § 1210.1).

B. Defendant's Conviction in case No. SS140667A

In 2014, while on probation, defendant was charged by complaint in case No. SS140667A with possession of a short-barreled rifle or shotgun (§ 33215; count 1), possession of methamphetamine (former Health & Saf. Code, § 11377, subd. (a));

count 2), and misdemeanor possession of controlled substance paraphernalia (former Health & Saf. Code, § 11364.1; count 3). The complaint also alleged that she had served three prior prison terms (§ 667.5, subd. (b)). On April 11, 2014, defendant pleaded guilty to count 2, possession of methamphetamine, and admitted that she had served two prior prison terms. Defendant entered her pleas and admissions with the understanding that she would receive a four-year sentence with the execution of sentence suspended, and that she would be placed on probation.

In the first case (No. SS132156A), a petition for revocation or modification of probation was filed alleging that defendant violated her probation. Defendant admitted the violation of probation.

A combined sentencing hearing was held regarding defendant's probation violation in the first case and her conviction in the second case. In the first case (No. SS132156A), the trial court terminated defendant's Proposition 36 probation. The court imposed a two-year sentence, suspended execution of the sentence, and placed defendant on three years formal probation with various terms and conditions, including that she serve time in jail. In the second case (No. SS140667A), the trial court imposed a four-year sentence to run concurrent with the sentence imposed in the first case, suspended execution of the sentence, and placed defendant on three years formal probation with various terms and conditions, including that she serve time in jail. The remaining counts and enhancement were dismissed.

C. Defendant's Probation Violation in Both Cases

In September 2014, a petition was filed in each case alleging that defendant violated her probation by failing to report to probation upon her release from custody. In May 2015, defendant admitted violating her probation. A sentencing hearing was scheduled but later continued to July 24, 2015.

D. Defendant's Petitions for Resentencing

In the meantime, on July 2, 2015, defendant apparently petitioned for recall of the sentences and resentencing under section 1170.18, subdivision (a) in both cases.² Defendant contended that felony possession of a controlled substance (former Health & Saf. Code, § 11377, subd. (a)) had been reclassified as a misdemeanor, that she was “currently serving” a “sentence” of “[f]elony [p]robation” for that offense, and that she should be resentenced to misdemeanors. Defendant argued that a probationer is eligible for relief under section 1170.18 and there was “no legal justification for sentencing . . . [defendant] to prison and then recalling the sentence and reducing the punishment pursuant to [section] 1170.18.”

E. The July 24, 2015 Sentencing Hearing and Hearing Regarding Defendant's Petitions for Resentencing

On July 24, 2015, a hearing was held regarding sentencing and regarding defendant's petitions for resentencing. Regarding defendant's petitions, the trial court indicated that defendant was not eligible for resentencing while she was on felony probation, that she would not become eligible until she was sentenced to prison, and that defendant's petitions were therefore denied. The court asked defense counsel, “[I]s [defendant] going to reject continuing on probation and I would sentence her to state prison? . . . And then the Court thinks the petition is appropriate to grant. [¶] How would you like to proceed, [defense counsel]?” Defense counsel started to respond, and the court again asked, “Is [defendant] rejecting probation?” Defense counsel responded, “Yes.”

The trial court proceeded to revoke and terminate probation in each case and ordered execution of the previously imposed felony sentences. Based on “defendant's

² The record on appeal contains only the petition in case No. SS140667A.

failure to successfully complete probation,” the court also lifted the stays on previously imposed \$300 probation revocation restitution fines in both cases (§ 1202.44).

The trial court then granted defendant’s petitions for resentencing in each case, recalled the sentences, and resentenced defendant to misdemeanors for the two felony drug convictions. In each case, the court denied probation and ordered defendant to serve 365 days in jail, with the sentences to run consecutively. The court granted 365 days custody credit in the first case (No. SS132156A), and 128 days custody credit in the second case (No. SS140667A). The court stated in each case that it had the discretion to reduce certain fines and fees, but that it was electing not to do so and that defendant had to pay any unpaid balance.

Defendant filed notices of appeal from the July 24, 2015 orders in both cases.

III. DISCUSSION

On appeal, defendant contends that the trial court erred by requiring her to decline probation and by “insist[ing] that the previously suspended sentences be imposed before [her] petitions could be granted.” Defendant argues that as a probationer she was “currently serving a sentence” within the meaning of section 1170.18, subdivision (a), and therefore she was eligible to have her felony convictions resentenced as misdemeanors. Alternatively, defendant argues that if the trial court correctly determined that, as a probationer, she had not yet been sentenced, then she “was entitled to be sentenced to the reduced punishment implemented upon passage of Proposition 47.” Defendant requests that the felony sentence be stricken and that any fines imposed because of that sentence be removed.

The Attorney General agrees that defendant was “currently serving a sentence” within the meaning of section 1170.18, subdivision (a) while she was on probation, and that the trial court erred in determining that it had to order execution of the previously imposed felony sentences before defendant could obtain relief under the statute. The

Attorney General also agrees that the felony sentences and “attendant fines” must be “reversed.”

We find appropriate the Attorney General’s concession that defendant was “currently serving a sentence” while on probation and was therefore eligible to petition for relief under section 1170.18, subdivision (a). In view of our conclusion, we do not reach the other issue raised by defendant regarding whether Proposition 47 operates retroactively to change her felony convictions to misdemeanors.

A. Legal Background: Proposition 47

On November 4, 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (the Act). (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.) Proposition 47 reclassified certain drug and theft related offenses as misdemeanors instead of felonies or alternative felony misdemeanors. (§ 1170.18, subd. (a); *People v. Shabazz* (2015) 237 Cal.App.4th 303, 308 (*Shabazz*)). The statutes amended by Proposition 47 include Health and Safety Code section 11377, subdivision (a), the former version of which provided the basis for defendant’s felony conviction in each case. Prior to Proposition 47, possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a) was a wobbler. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) As a result of Proposition 47, Health and Safety Code section 11377, subdivision (a) now provides that possession of specified controlled substances is punishable as a misdemeanor unless the defendant has certain disqualifying prior convictions.³

³ Health and Safety Code section 11377, subdivision (a) provides for the following punishment: “imprisonment in a county jail for a period of not more than one year, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 of the Penal Code if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code.”

Proposition 47 also enacted a new statutory provision, section 1170.18, which sets forth two different procedures for defendants seeking to have a felony conviction resentenced or designated as a misdemeanor. Relevant here, one of the procedures applies to a defendant who is “*currently serving a sentence*” for a felony conviction and who would have been guilty of a misdemeanor under the Act if the Act had been in effect at the time of the offense. (§ 1170.18, subd. (a), italics added.) Such a defendant may petition for a recall of his or her sentence and request resentencing in accordance with the amended statute that reclassified the defendant’s offense as a misdemeanor. (*Ibid.*)

If the petitioner meets the requisite statutory criteria, “the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b); see *id.*, subd. (c).) Section 1170.18 sets forth various factors that a court may consider in exercising its discretion. (*Id.*, subd. (b)(1)-(3).) A defendant is not eligible for resentencing if he or she has suffered a specified prior conviction. (*Id.*, subd. (i).) Generally, a defendant who is resentenced pursuant to section 1170.18 is subject to a one-year period of parole and may not possess a firearm. (*Id.*, subds. (d) & (k).)

B. “*Currently Serving a Sentence*”

In *People v. Garcia* (2016) 245 Cal.App.4th 555 (*Garcia*), we determined that the phrase “currently serving a sentence” in section 1170.18, subdivision (a), “appl[ies] to all those with felony dispositions, including those placed on probation who otherwise meet the conditions specified in the statutory scheme.” (*Garcia, supra*, at p. 559.)⁴ In *Garcia*, the trial court suspended imposition of sentence and placed the defendant on probation

⁴ In *People v. Davis* (2016) 246 Cal.App.4th 127, review granted July 13, 2016, S234324, the appellate court similarly concluded that probationers fall within the meaning of section 1170.18, subdivision (a).

for felony possession of a controlled substance (former Health & Saf. Code, § 11377, subd. (a)). (*Garcia, supra*, at p. 557.)

We agreed with the parties in *Garcia* that interpreting the statutory language to *not* include probationers would lead to absurd consequences. We observed that “there is nothing in either the ballot materials or the statutory language that appears to limit the phrase ‘currently serving a sentence for a conviction’ to those serving a term of imprisonment.” (*Garcia, supra*, 245 Cal.App.4th at p. 558.) Moreover, “granting probation is in some contexts a ‘sentencing choice’ (see, e.g., Cal. Rules of Court, rule 4.405(6) [“Sentence choice” means the selection of any disposition of the case that does not amount to a dismissal, acquittal, or grant of a new trial.’]). (Cf. *People v. Howard* (1997) 16 Cal.4th 1081, 1084 [referring to court’s authority ‘at time of sentencing’ either to suspend imposition of sentence or impose sentence and suspend its execution]; *In re DeLong* (2001) 93 Cal.App.4th 562, 571 [‘an order granting probation and suspending imposition of sentence is a form of sentencing’].)” (*Ibid.*) Indeed, “the language of another voter initiative, Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, used the language ‘sentenced to probation.’ (See *People v. Mendoza* (2003) 106 Cal.App.4th 1030, 1034 [quoting ballot pamphlet to distinguish conviction from sentence and referring to ‘sentence of probation’].)” (*Ibid.*)

We explained in *Garcia* that “[t]he ballot materials for Proposition 47 likewise indicate that the voters regarded probation as one of the options within a sentencing procedure; the legislative analysis refers to offenders who are ‘sentenced’ to supervision by a county probation officer while indicating that both jail time for eligible offenders and the caseloads of probation officers would be reduced by including felony probation as a disposition eligible for resentencing under section 1170.18. (See *Shabazz, supra*, 237 Cal.App.4th at p. 310 [discussing Prop. 47 mechanism for resentencing after being ‘sentenced or placed on probation’].) The Legislative Analyst discussed these options under the heading of ‘Misdemeanor Sentencing’ and generally noted the fiscal

consequences of ‘the *resentencing* of individuals currently serving sentences for felonies that are changed to misdemeanors.’ (Italics added.) Nothing in the text of the initiative, the legislative analysis, or the arguments for and against it indicate an intent to distinguish between a prison sentence and felony probation, or between a grant of probation after suspending imposition of sentence and an order imposing sentence but suspending its execution. The statute itself allows the recall of a ‘felony sentence’ and allows the petitioner to request ‘resentencing’ in Health and Safety Code section 11377 cases, without segregating those serving prison sentences from those serving probation terms. (§ 1170.18, subds. (a), (b).) . . . Proposition 47 was intended to reach those with ‘nonserious, nonviolent crimes like . . . drug possession,’ which would encompass many who were granted probation. (Voter Information Guide, [Gen. Elec. (Nov. 4, 2014)] text of Prop. 47, § 3, p. 70.) To deprive those defendants of the benefit of the reduced penalty for their offenses would create an incongruity the voters would not have either anticipated or approved.” (*Garcia, supra*, 245 Cal.App.4th at pp. 558-559, fns. omitted.)

C. Summary

Defendant, who was on probation, sought to have her felony drug convictions designated misdemeanors. The trial court determined that defendant was not serving a sentence within the meaning of section 1170.18, and that therefore the procedure for resentencing under section 1170.18 was not available to defendant while she was on probation. Consequently, in order to have her felony convictions immediately resentenced as misdemeanors, defendant was required by the court to decline probation. The court then proceeded to revoke and terminate defendant’s probation in both cases, order into effect the previously imposed felony sentences, and lift the stays on the previously imposed probation revocation restitution fines, before recalling the sentences and resentencing defendant to misdemeanors for her drug convictions under section 1170.18.

However, as we explained in *Garcia, supra*, 245 Cal.App.4th 555, which was filed after the hearing on defendant's petitions for resentencing in this case, defendant was "currently serving a sentence" within the meaning of section 1170.18, subdivision (a) at the time she was on probation. Therefore, the trial court could have properly considered defendant's petition for recall and resentencing under subdivision (a) without requiring defendant to decline probation and without revoking and terminating her probation in each case.

Although the trial court ultimately granted defendant's petitions for resentencing, we agree with defendant that she suffered at least one "negative consequence[]" as a result of the court's procedure in this case. In particular, in each of defendant's cases, the court lifted the stay on a previously imposed probation revocation restitution fine. Section 1202.44 provides that the "probation revocation restitution fine shall become effective upon the revocation of probation." In other words, "[t]he fine under section 1202.44 is stayed, *unless probation is revoked*. Once probation is revoked, imposition of the fine under section 1202.44 is mandatory and the court must lift the stay. [Citation.]" (*People v. Preston* (2015) 239 Cal.App.4th 415, 429.) In this case, in order for defendant to have her petitions for resentencing granted by the trial court, the court required defendant to "reject continuing on probation." Upon defendant "rejecting probation," the court revoked and terminated probation in both cases, ordered into effect the previously imposed felony sentences, and lifted the stays on the previously imposed probation revocation restitution fines, before granting defendant's petitions for resentencing. It thus appears from the record that the court lifted the stays on the probation revocation restitution fines only because the court believed that probation had to be revoked and that the previously imposed felony sentences had to be ordered into effect before the petitions for resentencing could be granted. As we have explained, however, the court could have considered defendant's petitions without requiring her to reject probation and without revoking and terminating her probation in each case. Based

on this record, we will order that the trial court's order lifting the stays on the probation revocation restitution fine be vacated.

However, to the extent defendant argues that she was improperly subjected to *other* fines or fees as a result of the trial court's sentencing and/or resentencing procedure in this case, she fails to (1) identify the purportedly improper fine or fee and (2) provide persuasive argument and legal authority establishing that she would not have been subject to the fine or fee if the trial court had followed the proper procedure in this case.

Accordingly, in each of defendant's cases we will vacate the trial court's order (1) revoking and terminating felony probation, (2) requiring execution of the previously imposed felony sentences, and (3) lifting the stay on the previously imposed probation revocation restitution fines.

IV. DISPOSITION

In case No. SS132156A, the order of July 24, 2015 is ordered modified by vacating: (1) the order revoking and terminating probation, (2) the order requiring execution of the two-year felony sentence, and (3) the order lifting the stay on the probation revocation restitution fine (Pen. Code, § 1202.44). As so modified, the order of July 24, 2015 is affirmed.

In case No. SS140667A, the order of July 24, 2015 is ordered modified by vacating: (1) the order revoking and terminating probation, (2) the order requiring execution of the four-year felony sentence, and (3) the order lifting the stay on the probation revocation restitution fine (Pen. Code, § 1202.44). As so modified, the order of July 24, 2015 is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.