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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO JUAN GARCIA,

Defendant and Appellant.

2d Crim. B268182
(Super. Ct. No. 2014012666)
(Ventura County)

Antonio Juan Garcia appeals from a post judgment order revoking his postrelease community supervision (PRCS) and sentencing him to jail. He contends, and the People concede, the trial court erred by ordering him to jail under Penal Code section 3455¹ instead of considering his eligibility for drug treatment under section 3063.1. We remand the matter for a determination of whether appellant qualifies for treatment under Proposition 36. In all other respects, we affirm.

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

PROCEDURAL HISTORY

Appellant pled guilty to second degree commercial burglary (§ 459), fraudulent use of an access card (§ 484g, subd. (a)) and possession of a controlled substance with a handgun (Health & Saf. Code, § 11370.1, subd. (a)). The remaining charges were dismissed, and he was sentenced to 36 months of formal probation. Appellant also was ordered to serve 270 days in county jail, with total presentence custody credit of 113 days.

Probation was terminated as unsuccessful, and appellant was sentenced to a term of two years in state prison with 400 days of custody credit. After serving that term, appellant was released on PRCS.

Appellant was arrested two months later. The Ventura County Probation Agency filed a petition for revocation of PRCS, alleging that appellant had engaged in conduct prohibited by law; had used or possessed narcotics, dangerous drugs, controlled substances, marijuana, or drug paraphernalia; and had failed to actively participate in substance abuse treatment. At a prior administrative hearing, appellant signed a PRCS waiver of rights and admission form, in which he waived his right to a revocation hearing and accepted a sanction of 60 days in county jail.

Appellant subsequently appeared in court with defense counsel, who argued that the waiver was invalid under *People v. Armogeda* (2015) 233 Cal.App.4th 428 (*Armogeda*). The trial court denied appellant's motion and ordered him to serve 60 days in county jail.

DISCUSSION

Appellant contends the trial court's order requiring him to serve jail time violated Proposition 36 because he was not

first referred to treatment for a non-violent drug possession (NVDP) offense. The People correctly concede the issue.

“Proposition 36 . . . mandates that, as a general rule, a person who commits a NVDP offense should be referred to drug treatment rather than to jail. [Citations.] Section 3063.1, enacted as part of Proposition 36, requires drug treatment rather than incarceration for most parolees who violate their parole by committing a NVDP offense. Parole may be revoked for a first-time NVDP offense only where the parolee poses a danger to the safety of others. (§ 3063.1, subds. (a), (d)(1).) Section 3455, applicable to PRCS, contains no such limitations; it authorizes revocation of PRCS and incarceration for up to 180 days for any violation of supervision conditions, including an NVDP offense.” (*People v. Gutierrez* (2016) 245 Cal.App.4th 393, 404 (*Gutierrez*).)

Armogeda, supra, 233 Cal.App.4th 428, 435, determined that section 3455 amended Proposition 36 because it authorized incarceration as a sanction for a NVDP violation of PRCS conditions. Because the statute was not enacted by a legislative super-majority, *Armogeda* held it improperly amended the voter initiative: “As applied to nonviolent drug possession offenders and violators of drug-related conditions of postrelease community supervision, section 3455, which permits the incarceration of those persons under circumstances not permitted by Proposition 36, unconstitutionally amends Proposition 36 and to that extent is invalid.” (*Id.* at p. 436.)

The People concede “section 3455 may not be applied in a manner that is inconsistent with the treatment requirements of Proposition 36. Thus, if appellant is otherwise eligible for treatment under Proposition 36, the trial court erred when it ordered him to serve 60 days in jail rather than to participate in

drug treatment.” (*Gutierrez, supra*, 245 Cal.App.4th at p. 404.) Accordingly, we will remand the matter to the trial court for a determination of appellant's eligibility for treatment under Proposition 36. (See *Gutierrez*, at pp. 404-405.)

DISPOSITION

The trial court erred when it imposed a jail term without first determining whether appellant qualifies for drug treatment under Proposition 36. We remand the matter for a finding on that issue. In all other respects, the order granting the petition for revocation of community supervision is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Gilbert A. Romero, Judge
Superior Court County of Ventura

Wayne C. Tobin, under appointment by the Court of
Appeal, for Defendant and Appellant.

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